192

744458
Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 625

PETER CALDAROLA, PETITIONER,

vs.

GERDA ECKERT AND THOR ECKERT, JR., PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF THOR ECKERT & CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 18, 1946.

CERTIORARI GRANTED NOVEMBER 12, 1946.

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Notice of Appeal to the Court of Appeals

Court of Appeals

OF THE STATE OF NEW YORK

PETER CALDAROLA,
Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co.,
Defendants-Respondents.

Sirs:

PLEASE TAKE NOTICE that the plaintiff Peter Caldarola hereby appeals to the Court of Appeals of the State of New York from an order entered in the office of the Clerk of the Supreme Court, Appellate Division, First Department, on the 5th day of April, 1946 where by the terms of the said order the Appellate Division ordered and adjudged that the judgment in favor of the plaintiff and against the defendants above named be in all things reversed upon

questions of law with costs to the defendants, and plaintiff's complaint dismissed with costs. Plaintiff, Peter Caldarola, also appeals from the judgment entered in the office of the clerk of the County of New York on the 9th day of April, 1946, which was in favor of the defendants Gerda Eckert and Thor Eckert, Jr. and against the plaintiff in the sum of $866.95. Plaintiff appeals from each and every part of
5 the said order and each and every part of the said judgment as well as from the whole thereof.

Dated: New York, April 10, 1946.

Yours, etc.,

ABRAHAM M. FISCH,
Attorney for Plaintiff,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
6 City of New York.

To:

KIRLIN, CAMPBELL, HICKOX & KEATING, ESQS.,
Attorneys for Defendants-Respondents,
120 Broadway,
New York City.

COUNTY CLERK OF THE COUNTY OF NEW YORK.

7

Order of Reversal on Appeal from Judgment Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of April, 1946.

8

Present:

HON. FRANCIS MARTIN,
Presiding Justice,
" ALFRED H. TOWNLEY,
" EDWARD J. GLENNON,
" JOSEPH M. CALLAHAN,
" DAVID W. PECK,
Justices.

16337

PETER CALDAROLA,
Respondent.

—against—

MOORE-McCORMACK LINES, INC., impleaded with GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Appellants.

9

An appeal having been taken to this Court

Order of Reversal on Appeal from Judgment Appealed From

by the defendants Gerda Eckert and Thor Eckert, Jr., partners, etc., from the judgment of the Supreme Court, New York County, entered on the 13th day of June, 1945, and said appeal having been argued by Mr. Raymond Parmer of counsel for the appellants, and by Mr. Abraham M. Fisch, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, reversed upon the questions of law with costs to the appellants, and the complaint dismissed with costs. (Two of the Justices dissent and vote to affirm.)

Enter,

F. M.

13

Judgment of Reversal and Dismissal Appealed From

SUPREME COURT

NEW YORK COUNTY

8618—1944

14

PETER CALDAROLA,
Plaintiff,

—*against*—

MOORE-McCORMACK LINES, INC., impleaded with GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Defendants.

15

Defendants Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co. having appealed to the Appellate Division of the Supreme Court for the First Judicial Department from the judgment entered in the office of the Clerk of the County of New York on June 13, 1945, which directed that the plaintiff, Peter Caldarola, recover of the defendants, Gerda Eckert and Thor Eckert, Jr., doing business under the firm name of Thor Eckert & Co., the total sum of $12,191.10, and the said Appellate Division

16 *Judgment of Reversal and Dismissal Appealed From*

having made and filed its order dated April 5, 1946 wherein it was ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, reversed upon questions of law, with costs to the appellants, and the complaint dismissed with costs, two of the Justices dissenting and voting to affirm, and a certified copy of said order of the Appellate Division, together with the record in
17 said Appellate Division, having been filed in the office of the Clerk of the County of New York, it is

ADJUDGED that the judgment so appealed from be and is hereby reversed, and it is further

ADJUDGED that the complaint herein be and is hereby dismissed, and that defendants Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., of 19 Rector Street, Borough of Man-
18 hattan, City of New York, recover of Peter Caldarola, plaintiff, of 1050—67th Street, Borough of Brooklyn, City of New York, the sum of $866.95, costs as taxed, and that said defendants have execution therefor.

Judgment signed this 9th day of April, 1946.

ARCHIBALD R. WATSON,
Clerk.

19

Opinion of the Appellate Division

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

March, 1946

FRANCIS MARTIN, *P.J.*,
ALFRED H. TOWNLEY,
EDWARD J. GLENNON, 20
JOSEPH M. CALLAHAN,
DAVID W. PECK, *JJ.*

16337

PETER CALDAROLA,
Respondent,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant, 21

impleaded with

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Defendants-Appellants.

Appeal from a judgment of the Supreme Court, New York County, entered on a verdict in favor of plaintiff.

22 *Opinion of the Appellate Division.*

RAYMOND PARMER, of Counsel (Vernon Sims Jones with him on the brief; KIRLIN, CAMPBELL, HICKOX & KEATING, attorneys) for defendants-appellants.

ABRAHAM M. FISCH, of counsel (Sidney Schiffman with him on the brief) for respondent.

—•—

PECK, *J.*:

23 Plaintiff, a longshoreman, while engaged in unloading cargo, was injured by the fall of a defective boom on the steamship "Everagra". The vessel was owned by the United States. Defendants-appellants had a contract with the United States, designated as a general agency contract, whereby they were appointed "agent to manage and conduct the business of vessels" assigned to them by the United States, including the "Everagra".

24 The contract provides that defendants-appellants are to conduct the business in accordance with directions, orders and regulations issued by the United States. The "business" includes the vessels' trade, collecting and accounting therefor, equipping, victualing, supplying and maintaining the vessels, inspecting and advising the United States with respect to the state of repair and condition of the vessels, and arranging for their repair.

As to operation of the vessels, the contract provides that defendants-appellants shall procure a Master who "shall be an agent and em-

ployee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel"; that they "shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel", the officers and members of the crew to be subject only to the orders of the Master.

The regulations of the War Shipping Administration, to which defendants-appellants' conduct of the business was subject, provide that they shall "determine the repairs necessary", and arrange for and order the performance of required repairs, with or without prior approval of the Repair Division of the War Shipping Administration, depending on whether the expenditure shall exceed $10,000.

Plaintiff might, of course, proceed against the United States in the Federal Court in Admiralty, where he would not be entitled to a jury trial, but brought this action against the agents in the State Court, where he could have a jury trial, on the theory that they were negligent in not repairing the defective boom and that such negligence gives rise to a cause of action in plaintiff's favor. Concededly, they had not supplied the boom and their alleged negligence was failure to repair the boom. Defendants-appellants contend that any failure on their part to repair the boom was only a breach of contract as to the United States and was not actionable negligence as to plaintiff.

Plaintiff agrees, preforce, with defendants-appellants' major premise that he may not avail himself of their breach of contract with the United States, but must bottom his cause of action on a showing of their control of the instrumentality causing the injury (*Cullings* v. *Goetz*, 256 N. Y. 287). The question, therefore, is whether they had such control of the boom as to incur responsibility to one in plaintiff's position for the condition of the boom.

29 Defendants-appellants were not vested with management or operation of the ship. Their contract with the United States makes it clear that their functions related to the ship's "business" as distinguished from its physical operation. They were not in control of the ship itself. That was vested in the Master as the agent of the United States and not as agent of defendants-appellants. They had no control over the use or operation of the ship machinery, such as the boom on the occasion of this 30 injury. They had access to the ship and had a contractual duty to the United States of inspecting and determining the necessity for repairs and arranging for the making of repairs.

Plaintiff regards defendants-appellants' access to the ship and their authority to order repairs as sufficient control to imply a responsibility for the condition of the ship to persons on the ship in connection with the ship's business. We cannot so regard it. The defendants-appellants did not in fact have control of the ship or its machinery, and the opportunity and duty which

they had to order repairs were contractual only and related only to the United States. They are not the equivalent of control or a substitute for control in relation to the public.

The defendants-appellants had not supplied the boom nor done anything to render it defective. Their failure to observe its condition and order its repair was strictly non-feasance. The distinction between misfeasance and non-feasance may be unimportant related to one in 32
control of property who has a responsibility, arising out of control, for the condition of the property, and whose failure to repair a dangerous condition may be regarded as negligent operation of the property and as actionable as his creation of the condition. Not so of one not in control and not having the public responsibility for the condition of the property. Nonfeasance on his part is not actionable except as to one to whom he has incurred an obligation of action.

The principal legal authority advanced by 33
plaintiff in support of his position is *Brady* v. *Roosevelt S. S. Co.* (317 U. S. 575). The agency contract in that case was very different, however, requiring the agent to man and operate the vessel.

We are unable to tell from the reported decisions of the Appellate Division, Second Department, in *Pedersen* v. *Stockard Steamship Corp.* (268 App. Div. 992) and *Pipitone* v. *Standard Fruit & S. S. Co.* (New York Law Journal, p. 988, March 12, 1946) whether the alleged negligence of the agent in those cases consist-

ed of furnishing defective equipment or failing to repair defective equipment. Reading the two decisions together, however, we do not gather the impression that the Court meant to indicate a view that non-feasance of the agent, under the contract involved in the present case, would be actionable. The New York cases cited in the *Pipitone* opinion are *Mollino* v. *Ogden & Clarkson Corp.* (243 N. Y. 450) in which the agent had taken "sole and absolute
35 control" of the property, and *Moch Co.* v. *Rensselaer Water Co.* (247 N. Y. 160) where the Court held the defendant not liable for non-feasance, pointing to the distinction between launching an instrument of harm and failing to become an instrument for good.

Defendants-appellants' duty to repair here was a duty owing only to the United States and arising out of contract. Plaintiff cannot avail himself of the contract, and having failed to show that defendants-appellants had such control of
36 the ship or boom as to make them publicly responsible for the condition of the ship or boom, plaintiff has failed to establish that defendants-appellants were under any duty to plaintiff to repair the boom or that their failure to make the repair was any breach of duty owed to the plaintiff or gave rise to any cause of action in plaintiff's favor.

The judgment should be reversed with costs, and the complaint dismissed with costs.

Martin, *P.J.*, and Callahan, *J.*, concur.

Townley and Glennon, *JJ.*, dissent and vote to affirm.

37

Stipulation as to Printing of Exhibits

COURT OF APPEALS

OF THE STATE OF NEW YORK

PETER CALDAROLA,
Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

38

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co.,
Defendants-Respondents.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties in the above entitled action that the exhibits which were not included in the printed record on appeal in the Appellate Division but used during the argument by counsel shall again be omitted from the printed record on appeal with leave to either counsel to submit same to the Court of Appeals at the time of the argument. 39

Dated: New York, N. Y., April 24th, 1946.

ABRAHAM M. FISCH,
Attorney for Plaintiff-Appellant.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Respondents.

40

Waiver of Certification

(Court of Appeals)

Pursuant to Section 170 of the Civil Practice Act,

It is hereby stipulated that the foregoing consists of true and correct copies of the Record on Appeal as filed with the Clerk of the Appellate Division, First Department; the Notice
41 of Appeal to the Court of Appeals, the Order of Reversal on Appeal from Judgment Appealed From, the Judgment of Reversal and Dismissal Appealed From and the Opinion of the Appellate Division, all of which are now on file in the Office of the Clerk of the County of New York.

Certification of all the foregoing papers is hereby waived.

Dated: New York, N. Y., April 24th, 1946.

Abraham M. Fisch,
42 *Attorney for Plaintiff-Appellant.*

Kirlin, Campbell, Hickox & Keating,
Attorneys for Defendants-Respondents.

43

Order Granting Leave to Prosecute Appeal on Seven Copies of Appellate Division Record

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the eighteenth day of April, A. D. 1946. 44

Present:

HON. JOHN T. LOUGHRAN,
Chief Judge, presiding.

PETER CALDAROLA,
Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant, 45

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Respondents.

A motion having heretofore been made herein upon the part of the appellant for leave to prosecute his appeal on seven copies of record in Appellate Division, papers having been

46 *Order Granting Leave to Prosecute Appeal on Seven Copies of Appellate Division Record*

submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

A Copy

47 RAYMOND J. CANNON,
Deputy Clerk.

(SEAL)

48

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PETER CALDAROLA,

Plaintiff-Respondent,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,

Defendants-Appellants.

CASE ON APPEAL

KIRLIN CAMPBELL HICKOX & KEATING,
Attorneys for Defendants-Appellants,
120 Broadway,
New York City.

ABRAHAM M. FISCH,
Attorney for Plaintiff-Respondent,
225 Broadway,
New York City.

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PLAINTIFF'S EXHIBITS:

1. Agreement made as of March 1, 1943 between the War Shipping Administration and Thor Eckert and Company (received in evidence at fol. 56) 337

2, 3, 4 and 5. Medical Exhibits (received in evidence at fol. 239) 357

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6. Collection of orders and regulations of the War Shipping Administration (received in evidence at fol. 324) .....

7. Book containing compilation of certain standard contract forms of War Shipping Administration (received in evidence at fol. 328) .....

8. Maintenance and Repair Regulations No. 1 (Revised) dated August 20, 1942 (received in evidence at fol. 341) 358

DEFENDANTS' EXHIBITS:

A, B, C and D. Photographs (received in evidence at fols. 101, 105, 114, 177) .....

E. Model of ship (received in evidence at fol. 228) .....

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L. Certificate (received in evidence at fol. 368) .....

M. Maintenance and Repair Regulation (revision of Dec. 15, 1944, effective Jan. 15, 1945) (received in evidence at fol. 420) . 365

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* Omitted pursuant to stipulation.

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N, O, P and Q. Photographs (received in evidence at fol. 552) ..... *

R and S. Envelopes and pieces of wood enclosed (received in evidence at fols. 562, 564) ..... *

T. Stevedoring contract between War Shipping Administration and the Jarka Corporation (received in evidence at fol. 703) ..... *

U. Letter (received in evidence at fol. 710) . *

V-1 and V-2. Pieces of wood (received in evidence at fols. 828, 829) ..... *

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* Omitted pursuant to stipulation.

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PETER CALDAROLA,

Plaintiff-Respondent,

—*against*—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,

Defendants-Appellants.

Statement Under Rule 234.

The above-entitled action was commenced by the service of a summons and complaint on defendants, Gerda Eckert and Thor Eckert, Jr., partners, doing business under the firm name of Thor Eckert & Company, on March 8, 1944. The answer of the said defendants was served on April 24, 1944. The plaintiff-respondent appeared by Abraham M. Fisch, Esq. Defendants-appellants appeared by Messrs. Kirlin, Campbell, Hickox & Keating.

The names of the original parties appear above in full, except that Moore-McCormack Lines, Inc., was originally named as defendant but was never served and was considered at the trial as not being a party to the action. Gerda Eckert and Thor Eckert, Jr., partners, doing business under the firm name of Thor Eckert & Co., were sued as Thor Eckert & Company, Inc. This misnomer was corrected at the trial.

2

Notice of Appeal.

SUPREME COURT

NEW YORK COUNTY

PETER CALDAROLA,

Plaintiff,

—against—

MOORE-McCORMACK LINES, INC. and GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,

Defendants.

8618/1944.

SIR:

PLEASE TAKE NOTICE that the defendants, Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., hereby appeal to the Appellate Division of the Supreme Court for the First Judicial Department from the judgment entered in the office of the Clerk of the County of New York on June 13, 1945, which directed that the plaintiff, Peter Caldarola, recover of the defendants, Gerda Eckert and Thor Eckert, Jr., doing business under the firm name of Thor Eckert & Co., the total sum of $12,191.10, and that said defendants appeal from each and every part of said judgment as well as from the whole thereof.

3

Notice of Appeal.

Dated, New York, July 2, 1945.

7

Yours, etc.,

KIRLIN CAMPBELL HICKOX & KEATING,
Attorneys for Defendants Gerda Eckert and Thor Eckert, partners doing business under the firm name of Thor Eckert & Co., originally sued as Thor Eckert & Co., Inc.,
Office and Post Office Address:
120 Broadway,
New York 5, N. Y.

8

To:

ABRAHAM M. FISCH, Esq.,
Attorney for Plaintiff,
225 Broadway,
New York.

9

4

Summons.

SUPREME COURT

10

NEW YORK COUNTY

PETER CALDAROLA,

Plaintiff,

—against—

MOORE-McCORMACK LINES, INC., and
THOR ECKERT & CO. INC.,

Defendants.

11

Plaintiff designates New York County, as the place of trial.

To the above-named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after service of this summons, exclusive of the day of service and in case of your failure to appear, or answer, judg-
12 ment will be taken against you by default, for the relief demanded in the complaint.

Dated, March 8, 1944.

ABRAHAM M. FISCH,
Plaintiff's Attorney,
Office and Post Office Address,
225 Broadway,
Borough of Manhattan,
New York City.

Complaint.

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Plaintiff, by his attorney, Abraham M. Fisch, complaining of the defendants herein, respectfully shows to this Court and alleges:

First: Upon information and belief that at all of the times hereinafter mentioned, the defendant Moore-McCormack Lines, Inc. was a corporation duly organized and existing under and by virtue of the laws of one of the States of the United States of America other than the State of New York.

Second: Upon information and belief that at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. was a corporation duly organized and existing under and by virtue of the laws of one of the States of the United States of America other than the State of New York.

Third: Upon information and belief that at all of the times hereinafter mentioned, the defendant Moore-McCormack Lines, Inc. was a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Fourth: Upon information and belief that at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. was a corporation duly

organized and existing under and by virtue of the
16 laws of the State of New York.

Fifth: That upon information and belief that at all of the times hereinafter mentioned, the defendant Moore-McCormack Lines, Inc. had a place for the transaction of its business at No. 5 Broadway, Borough of Manhattan, City of New York.

Sixth: That upon information and belief that at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. had a place for the transaction of its business at No. 19 Rector
17 Street, Borough of Manhattan, City of New York.

Seventh: That at all of the times hereinafter mentioned, the defendant Moore-McCormack Lines, Inc. operated and controlled, or was the charterer of the vessel known as SS Everagra.

Eighth: That at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. operated and controlled, or was the charterer of the vessel known as SS Everagra.

Ninth: That on the 27th day of January, 1944,
18 the defendant Moore-McCormack Lines, Inc. was the operator of a vessel known as SS Everagra, which on that day was in navigable waters at Pier 34, North River, Borough of Manhattan, City of New York.

Tenth: That on the 27th day of January, 1944, the defendant Thor Eckert & Co. Inc. was the operator of a vessel known as SS Everagra, which on that day was in navigable waters at Pier 34,

North River, Borough of Manhattan, City of New York. 19

Eleventh: That prior to the 27th day of January, 1944 the defendant Moore-McCormack Lines, Inc., pursuant to an arrangement entered into, had undertaken and agreed to operate the vessel SS Everagra, as agent for the owner or for those who had authority to possess and control the destinies of said vessel.

Twelfth: That prior to the 27th day of January, 1944 the defendant Thor Eckert & Co. Inc., pursuant to an arrangement entered into, had undertaken and agreed to operate the vessel SS Everagra, as agent for the owner or for those who had authority to possess and control the destinies of said vessel. 20

Thirteenth: That upon information and belief that on the 27th day of January, 1944, the members of the crew of the vessel SS Everagra were employed by the defendant Moore-McCormack Lines, Inc. as operator of the said vessel and as agent for those who had control of the destinies of the said vessel.

21

Fourteenth: That upon information and belief that on the 27th day of January, 1944, the members of the crew of the vessel SS Everagra were employed by the defendant Thor Eckert & Co. Inc. as operator of the said vessel and as agent for those who had control of the destinies of the said vessel.

Fifteenth: Upon information and belief that at all of the times hereinafter mentioned, the de-

fendant Moore-McCormack Lines, Inc. as operator
22 of the said vessel and acting as agent for those who had charge of the destinies of the said vessel, operated, controlled and maintained the said vessel, made repairs, hired the crew, paid the crew and did all things that is usually done by an agent or operator when employed to operate a vessel.

Sixteenth: Upon information and belief that at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. as operator of the said vessel and acting as agent for those who had charge of the destinies of the said vessel, operated,
23 controlled and maintained the said vessel, made repairs, hired the crew, paid the crew and did all things that is usually done by an agent or operator when employed to operate a vessel.

Seventeenth: That on or about the 27th day of January, 1944, while the plaintiff was lawfully and properly upon the defendants' vessel SS Everagra, which on that day was in navigable waters at or about Pier 34, North River, Borough of Manhattan, City and State of New York and being at the time and place mentioned in the employ of a corporation other than the defendants and upon the
24 business which was of mutual interest to the defendants and the plaintiff's employer, he was seriously injured through the negligence on the part of the defendants, their agents, servants and/or employees and without any fault or negligence on the plaintiff's part which in anyway contributed thereto.

Eighteenth: That while the plaintiff was lawfully and properly on the vessel, as aforesaid, he was seriously injured when one of the booms which was a portion of the ship's equipment, broke, gave

way and fell. The defendants were negligent in failing to take the proper means and precautions to guard against and avoid the breaking of the said boom; the defendants failed to give the plaintiff a safe and sufficient place in which to work; failed to use reasonable care to inspect the booms and the appliances which kept the booms in place to see to it that they were in good condition and sufficiently strong enough to bear the weight placed upon them in the movement of cargo. That the falling of the boom which caused the plaintiff to be injured was caused by the fact that the boom and the appliances holding the boom in place were not constituted to bear the weight of the lifting and lowering of cargo. It was also caused by the fact that the defendants had failed to provide a good, sufficient and usual and customary preventor and that the failure to do so, was one of the causes for the breaking of the boom. That the boom which fell with the other appliances which gave way was a result of the defendants' failure to use reasonable care in making a proper inspection; in furnishing proper ship's equipment and to remedy any defect or danger which an inspection would have shown. That the defendants in control of the ship's equipment, its engines, boilers, etc., failed to supply sufficient quantity of steam and lifting power in order to lift and raise cargo, and by reason thereof, the stowing and the discharging of the cargo was not done in the usual and customary manner, which also was one of the causes for the boom breaking, all of which the defendants had notice thereof.

Nineteenth: That by reason of the carelessness and negligence on the part of the defendants, their agents, servants and/or employees, the plaintiff

was rendered sick, sore, disabled and injured,
28 bruised and wounded, from which injuries he has suffered, still suffers and will continue to suffer great physical pain and mental anguish, to his damage.

Twentieth: That by reason of the carelessness and negligence on the part of the defendants, their agents, servants and/or employees, as aforesaid, plaintiff has become disabled to such an extent as to seriously interfere with the active prosecution of his employment, and may in the future be
29 deprived of earning his livelihood, to his damage.

Twenty-first: That as a result of the injuries sustained by plaintiff as aforesaid, plaintiff has become indebted in sums of money in endeavoring to be cured of his injuries and to alleviate his pain and suffering, and as he has been informed and verily believes, will be compelled to incur future obligations in endeavoring to be cured of his injuries and to alleviate his pain and suffering, all to his damage in the sum of Twenty-five Thousand ($25,000.00) Dollars.

30 WHEREFORE, plaintiff demands judgment against the defendants herein in the sum of Twenty-five Thousand ($25,000.00) Dollars, together with the costs and disbursements of this action.

ABRAHAM M. FISCH,
Attorney for Plaintiff,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
City of New York.

Answer.

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., sued herein as Thor Eckert & Co., Inc., one of the defendants herein, answering the complaint by their attorneys allege on information and belief as follows:

First: They deny that they have any knowledge or information thereof sufficient to form a belief as to each and every matter contained in Paragraph numbered First of the complaint.

Second: They allege that at the time of the commencement of the action, they were not a corporation. They deny each and every other allegation contained in Paragraph numbered Second of the complaint.

Third: They deny that they have any knowledge or information thereof sufficient to form a belief as to each and every matter contained in Paragraph numbered Third of the complaint.

Fourth: They allege that at the time of the commencement of this action, they were not a corporation. They deny each and every other allegation contained in Paragraph numbered Fourth of the complaint.

Fifth: They deny that they have any knowledge
34 or information thereof sufficient to form a belief as to each and every matter contained in Paragraph numbered Fifth of the complaint.

Sixth: They admit that at the times mentioned in the complaint they had a place for the transaction of business at 19 Rector Street, Borough of Manhattan, City of New York. They deny each and every other allegation contained in Paragraph numbered Sixth of the complaint.

Seventh: They deny each and every allega-
35 tion contained in Paragraph numbered Seventh of the complaint.

Eighth: They deny each and every allegation contained in Paragraph numbered Eighth of the complaint.

Ninth: They deny each and every allegation contained in Paragraph numbered Ninth of the complaint.

Tenth: They deny each and every allegation contained in Paragraph numbered Tenth of the
36 complaint.

Eleventh: They deny that they have any knowledge or information thereof sufficient to form a belief as to each and every matter contained in Paragraph numbered Eleventh of the complaint.

Twelfth: They deny each and every allega-tion contained in Paragraph numbered Twelfth of the complaint.

Thirteenth: They deny each and every allegation contained in Paragraph numbered Thirteenth of the complaint. 37

Fourteenth: They deny each and every allegation contained in Paragraph numbered Fourteenth of the complaint.

Fifteenth: They deny each and every allegation contained in Paragraph numbered Fifteenth of the complaint.

Sixteenth: They deny each and every allegation contained in Paragraph numbered Sixteenth of the complaint. 38

Seventeenth: They deny each and every allegation contained in Paragraph numbered Seventeenth of the complaint.

Eighteenth: They deny each and every allegation contained in Paragraph numbered Eighteenth of the complaint.

Nineteenth: They deny each and every allegation contained in Paragraph numbered Nineteenth of the complaint. 39

Twentieth: They deny each and every allegation contained in Paragraph numbered Twentieth of the complaint.

Twenty-first: They deny each and every allegation contained in Paragraph numbered Twenty-first of the complaint.

Answer.

Further Answering the Complaint, and as a First, Separate, Complete and Distinct Defense Thereto, Defendants Allege on Information and Belief as Follows:

Twenty-second: That if the plaintiff sustained any injuries as alleged in the complaint, said injuries were caused in whole or in part by his own negligence, and were not caused or contributed to in any manner by any negligence of these defendants.

Twenty-third: That the injuries to plaintiff, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to him at and before his alleged injuries and all of said risks, dangers and hazards had been assumed by him.

WHEREFORE, the defendant demands that the complaint herein be dismissed with costs to the defendant as against the plaintiff, and each other further and different relief as the justice of the cause may require.

KIRLIN CAMPBELL HICKOX KEATING & MCGRANN,
Attorneys for the Defendants,
Gerda Eckert & Thor Eckert,
sued herein as Thor Eckert & Co., Inc.,
Office & P. O. Address:
120 Broadway,
Borough of Manhattan,
City of New York.

(Verified April 23, 1943 by Gerda Eckert.)

15

Judgment Appealed From.

SUPREME COURT

NEW YORK COUNTY

43

[SAME TITLE]

The above entitled action and the issues therein having been duly and regularly reached for trial on the calendar of this Court at a Trial Term, Part VI thereof on the 4th day of June, 1945 before the Hon. Mr. Justice James B. M. McNally, one of the Justices of this Court and a jury, and the parties 44
having appeared by their respective attorneys, and the issues having been duly tried on the 5th, 6th, 7th, 8th, 11th and 12th days of June, 1945 and the jury having on the merits of this action duly rendered a verdict in favor of the plaintiff Peter Caldarola and against the defendants Gerda Eckert & Thor Eckert Jr., doing business under the firm name of Thor Eckert & Co. in the sum of Twelve thousand ($12,000.00) Dollars.

Now, on motion of Abraham M. Fisch, attorney for the plaintiff, it is

ORDERED, that the plaintiff Peter Caldarola re- 45
cover of the defendants Gerda Eckert and Thor Eckert Jr., doing business under the firm name of Thor Eckert & Co. the sum of Twelve thousand ($12,000.00) Dollars, together with $191.10 costs and disbursements, amounting in all to the sum of $12,191.10 and that the plaintiff have execution therefor.

Dated: New York, June 13, 1945.

ARCHIBALD R. WATSON,
Clerk.

16

Extract From Clerk's Minutes.

SUPREME COURT

46

TRIAL TERM—PART VI

June 13, 1945.

[SAME TITLE]

I hereby certify that this cause was tried before Hon. James B. M. McNally and a Jury, on the 4, 5, 6, 7, 8, 11 and 12 days of June, 1945, and a
17 verdict rendered therein for the plaintiff for the sum of $12,000. Defendants' motion to set aside verdict was denied. 30 days stay of execution and 60 days to make a case allowed.

ARCHIBALD R. WATSON,
Clerk.

Recorded
June 14/45
Photostat Div.
N. Y. Co. Clk's Office.

48

Case and Exceptions.

SUPREME COURT

NEW YORK COUNTY

TRIAL TERM—PART VI

PETER CALDAROLA,

Plaintiff,

—*against*—

THOR ECKERT & CO., INC.,

Defendant.

June 11th to 12th, 1945.

Before:

HON. JAMES B. McNALLY,

Justice,

and a Jury.

APPEARANCES:

For the Plaintiff:

A. M. FISCH, Esq.,
225 Broadway,
New York City.

For the Defendant:

KIRLIN, CAMPBELL, HICKOX & KEATING, Esqs.,
120 Broadway, N. Y. City.
By Raymond Parmer, Esq., of counsel.

JOSEPH G. GOLD, C.S.R.,
Official Court Reporter
1941 Haviland Avenue,
Bronx, N. Y.

Monday, June 4th, 1945.

52

Mr. Fisch: It is now admitted by the defendant that they are a partnership.

Mr. Parmer: We are a partnership.

The Court: You moved to amend the complaint, Paragraph 4th thereof, to read that Thor Eckert & Co., Inc., is a partnership instead of a corporation?

Mr. Fisch: That is right.

The Court: Motion granted on consent.

Mr. Fisch: And that the partnership consists of Gerda Eckert and Thor Eckert, Jr., partners, doing business under the firm name of Thor Eck-

53 ert & Company. Moore-McCormack Lines was not served and therefore it is not necessary to discontinue, and treated as if it never existed.

The Court: All right.

(Jury impaneled and sworn.)

(Mr. Fisch opened to the jury in behalf of the plaintiff.)

(Mr. Parmer opened to the jury in behalf of the defendant.)

54 Mr. Fisch: We should like at this time to offer the agency agreement into evidence. I think you have that together with the pleadings of the Court.

Mr. Parmer: I have an objection to his offer as a complete statement of the relations between the United States and the general agent. If it is subject to being connected up with the orders and regulations which are referred to in the contract, that is all right. I have no objection to that.

Mr. Fisch: I offer the contract in evidence. That is all I can do. That is the only thing I have. 55
I know nothing about the regulations.

The Court: Have you the contract and a copy which is attached to the complaint?

Mr. Fisch: That is the only thing I have. That was furnished to me.

Mr. Parmer: That is the contract, but on its face it refers to the orders and t' egulations. On its face it refers to the rules and regulations of War Shipping Administration and therefore if the contract is offered as a complete exposition of the relations between the United States and the 56
general agent, I object to it. However, I have no objection to it being offered subject to being connected up with the rules and regulations.

The Court: Overruled. Mark it.

(Received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Parmer: Your Honor will adjourn for the day?

The Court: All right, as I understand counsel are requesting an adjournment until tomorrow morning. 57

Mr. Fisch: We consent.

The Court: Ladies and gentlemen of the jury, you have been sworn as jurors in a cause. Do not discuss the case among yourselves nor permit anybody to discuss it with you and do not visit the scene of the accident. Ten o'clock tomorrow morning. Trial Term. Part VI. Room 331.

(Whereupon an adjournment was taken to Tuesday, June 5, 1945, at 10 o'clock, A. M.)

Tuesday, June 5, 1945.

58

TRIAL RESUMED.

(Same appearances.)

PETER CALDAROLA, residing at 1050-67th Street, Brooklyn, N. Y., the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Q. Mr. Caldarola, will you speak up so all the jurymen can hear you? Did you hear what I said? A. No. Come a little closer.

59

Q. No. I am going to stay here. Will you speak loud so we can all hear you? A. Yes.

Q. How old are you? A. Fifty-one.

Q. Were you hurt in January, 1944? A. Yes, sir.

Q. Where were you working? A. Pier 34, North River.

Q. What street is that? A. It's Canal Street.

Q. Whom did you work for? A. For Jarka Corporation.

Q. What is the business of Jarka? A. Stevedore.

Q. Is that the same thing as longshoreman? A. Longshoreman.

60

Q. What were you doing that day when you were hurt? A. Longshoreman.

Q. When were you hurt? Give us the date in January. A. January 27th.

Q. Now, how much experience have you had in longshore work? How many years? A. I started longshoreman in 1912.

Q. On the day of the accident, were you operating a winch? A. I was operating a drum.

Q. A drum? A. Yes.

Q. Which is that? A. The niggerhead. 61

Q. On what? A. On the Burton.

Q. On the Burton what? A. Burton fall.

Q. Burton boom? A. Burton boom.

Q. What is the Burton boom? What does it do? A. It delivering and discharge, delivering the cargo to the dock.

Q. How does the Burton boom work? A. Well, the two fall are "attached" together with the up-and-down, and the up-and-down comes up hatch, Burton takes up and brings to the dock.

Q. The up-and-down boom picks up the cargo, 62
is that right? A. The cargo from down the hatch.

Q. From down the hatch? A. And the Burton takes over and delivers to the dock.

Q. But the up-and-down boom—

Mr. Fisch: I am going to lead him a little bit, Ray, so the jury can get it.

Q. —picks up the cargo to a certain height, is that right? A. Yes.

Q. And then when the up-and-down gets the cargo a certain height off the deck— A. That's right, about a foot off the coam of the hatch. 63

Q. A foot off the coaming of the hatch? A. Of the hatch.

Q. And then your boom— A. My fall.

Q. Your fall, rather? A. The Burton fall.

Q. The Burton fall swings the cargo wherever you want to swing it to? A. Inshore.

Q. Inshore? A. Inshore.

Q. Were you working this niggerhead for the Burton—where were you working it on the day of the accident? A. On the day of the accident, yes.

Q. How many years of experience have you had
64 working the niggerhead? A. Oh, my God, I work it for years in the North River for that line, for the Hogan, White Star Line,—all over.

Q. What time was it you got hurt? What time was it that you got hurt? A. Well, it was about nearer to 1:30.

Q. 1:30 in the day? A. It was the first draft, 1:15, 1:20. It was the first draft.

Q. 1:20 in the afternoon? A. In the afternoon.

Q. Tell us how you got hurt, please. A. All day, we would take this draft, and when we had this draft, and when you got up on deck between
65 the coam of the hatch and the rail, I saw this draft drop on deck, and second right after that, something hit me in the head, and fell unconscious.

Q. What was the draft? What did it consist of? What were you lifting? A. Cocoa beans.

Q. How were those cocoa beans packed? Were they in cases or in bags? A. Bags, burlap bags.

Q. How many pounds did a bag weigh? A. Well I don't know.

Q. How many bags did you have in that draft? A. Nine bags.

Q. How were the bags slung around? What
66 did you tie them with? What were they tied with, these bags? A. I don't get you.

Q. How were they tied around, the bags? A. with slings, canvas slings. Canvas, canvas and the rope, see, so they wouldn't tear the bag at the bottom, you see, when you delivering them. We call them canvas slings.

Q. Were those cocoa bags in a net? A. No.

Q. Or did you have slings around them? A. No, slings, canvas slings.

Q. At the time that you were hurt, were the

cocoa bags being put into the hold or being taken out of the hold? A. Taken out of the hold. 67

Q. What hatch were you working? A. Number 3 hatch.

Q. With reference to the ship, where was it located? Was it located in the middle of the ship or fore or aft? A. In the middle of the ship in the bunker hatch. There used to be a bunker hatch.

Q. What happened to you when you were hit on the head? What happened to you? A. Fell unconscious.

Q. How long did you remain unconscious, do you remember? A. No, I don't remember. I don't know. 68

Q. Do you remember coming out of unconsciousness? A. I do remember coming out unconscious, yes.

Q. What did you see when you came out? A. Well, I see everything turn over, and for a while—

Q. Did you see the boom? A. Well, then after I asked the men—

Q. Never mind. Did you see the boom? A. I did.

Q. What did you see the boom—was it whole or broken? A. Broken. 69

Q. Whereabout was it broken? A. Where I was standing to work.

Q. Now, how long was the boom about? A. Well, there was a small piece and a long piece.

Q. When the boom was in good condition before it was broken, how many feet long was it? A. Well, it was about 30, 35 feet long.

Q. Made out of what? A. Wood.

Q. And where it broke off, did it break off near the top? A. No.

Q. Or on the bottom or in the middle or where?
70 A. Near the bottom.

Q. How many feet away from the bottom, if you say near the bottom? A. Well, I couldn't tell you exactly. I know it was—I saw the big piece laying there. I didn't see the small piece how big it was.

Q. Did you go any place after the accident? Were you taken any place? A. They took me right up to the office.

Q. And after that where did you go? A. In the hospital, in the ambulance.

71 Q. What hospital? A. Downtown Hospital.

Q. Where is it located? A. Broad Street, down —at the foot of Broad Street.

Q. That is New York, Manhattan? A. New York.

Q. Did you have any pain after the accident? A. Oh, yes.

Q. Where? A. I had a lot pain all over my head, all over my back, the head and my back. All my mouth was pained.

Q. When you were in the hospital, did you have any pain? A. I did.

Q. Where? A. Some—all over my head, in this
72 side here.

Q. How long did you stay at the Downtown Hospital? How long did you stay there? A. Four days.

Q. And after you came out, where did you go? A. Well, I asked my pal to take me home, because I wanted to get out of there. I felt so bad, I want to die home.

Q. How long did you stay home? A. Three days.

Q. And then where did you go? A. Then they took me in the ambulance. They took me to St. Peter's Hospital.

Q. And where is St. Peter's Hospital located? A. Henry Street, and Concord Street. 73

Q. How long did you stay there? A. I stayed there about 20-and 25 days, something like that.

Q. When you were in the St. Peter's Hospital, did you have any pain? A. Yes.

Q. Where? A. In my head, my back, way to my back, the spine.

Q. Then from the St. Peter's Hospital, you went home, did you? Did you go home after that? A. Yes.

Q. What happened when you got home? Did you walk around or did you stay in bed? A. No. 74 No. I had to stay in bed.

Q. For how long a time? A. Oh, for about two more months.

Q. Did you have anybody treat you while you were in bed at home? A. Yes, the doctors come.

Q. Doctors? A. Yes.

Q. What is the name of the doctor? A. Dr. Mulliko.

Q. Who is Dr. Mulliko? A. Dr. Mulliko is the assistant doctor of Dr. Patello.

Q. And he treated you for two months? A. Yes, and then he asked me to go to his office after, when I was able to walk. 75

Q. When you were able to go to the office, tell us whether there was anything wrong with you? A. Yes.

Q. What? A. I told him that the pain is still on the head and so much noise.

Q. Noise where? A. On my head.

Q. Noise on your head? A. Yes, noise.

Q. Wait a minute. How do you know you got noise on your head? A. My God, I can hear it.

Q. You hear the noise? A. You hear it. Also

I claim a lot of headache and dizzy. Every time
76 when I do something, go up and down, my head gets dizzy, and over here in the back, it's—

Q. You are pointing to the back of your head? A. Yes, of the head. It's a very sharp pain, and continually it comes up and bangs right in back here, rub-rank in back of my head here, and every time turn my head, all these bones squeak.

Q. Are you talking about the way you feel now or the way you felt when you went to the doctor? A. When I went to the doctor and the way I am feeling now yet the same way, and I told him that
77 my neck—I can't turn my neck, it pained. The doctor told me can't do nothing about that, it will reman like that.

Q. What was your condition before you got hurt? A. All right.

Q. Condition of health. A. Well, I just had diabetes, that is all, and I was take care of diabetes, and I was strong.

Q. How long did you have diabetes, before you got hurt? A. About ten years.

Q. How many years? A. Ten years.

Q. Did you take anything for it? A. Yes.

Q. What did you do? A. Insulin.

78 Q. Do you still take insulin? A. Yes, sir.

Q. Every day? A. Every day.

Q. Did you ever anything wrong with your head or did you feel dizzy? A. No, never did.

Q. Did you ever have any noise in your ears? A. No, sir.

Q. What sort of noise is that? Can you describe it to us, please? A. Yes, sir about a hundred chicks, chip—hear a lot of chicks chipping.

Q. A lot of chicks? A. Chicks.

Mr. Parmer: Chickens.

The Witness: Chickens. That is what I hear all over my head, and whistle like a peanuts whistle, peanuts stand—e-e-e-e, and chicks chipping, ch-ch-ch-ch otherwise, just like I have a storm when the rain hits on the ground. All that noise. 79

By Mr. Fisch:

Q. Have you returned to work since the accident? A. Eh?

Q. Have you gone back to work since the accident? A. No, sir. 80

Q. Why? A. Well, I have pain and dizzy. My neck pain.

Q. Have you tried doing any work? A. All I did in my house is take can out. That is all.

Q. What happens when you take a can out and do something? A. Well, I get dizzy. It hurts my head; every time I put my head down, it hurts my head.

Q. You worked as a longshoreman. What was your average earnings? How much did you make a week on the average, about? A. About $43.

The Court: Will you suspend just a moment? 81

(Short recess declared, following which the trial was resumed.)

Cross Examination by Mr. Parmer:

Q. Mr. Caldarola, at what pier was this vessel on which you were when you were injured? A. Pier 34, North River.

Peter Caldarola—for Plaintiff—Cross.

Q. Is that a Moore and McCormack pier? Is
82 that a Moore and McCormack pier? A. On the north side.

Q. Has that got Moore & McCormack on the outside of it? A. It's on the north side of the dock.

Q. You do not know which pier it is? A. Pier 34 North River.

Q. You don't know whether it's Moore & McCormack's pier, do you? A. Well, it's close to the dock.

Q. What?

By the Court:

83

Q. Is it a Moore & McCormack pier, the lawyer wants to know? Do you know Moore & McCormack? Don't you? A. McCormack.

Q. Moore & McCormack. A. No.

Q. Is it on the Moore & McCormack pier? A. I don't know.

Q. You don't know? You are hard of hearing, aren't you? A. yes.

By Mr. Parmer:

Q. Mr. Caldarola, your job was handling the
84 fall or the rope on one of these drums? A. Yes, sir.

Q. And your drum was the nearest one to the dock? A. Yes, sir.

Q. In doing the work that you were doing at the time of the accident, how many turns of the rope did you have around the drum? A. Well, I had four turns.

Q. And was it rope that you were using? Was it rope? A. Rope, yes.

Q. And did you operate in this way, Mr. Caldarola: In order to pull the load, you tightened up on the free end of the rope which you held in your hand? A. You take one turn when you start. 85

Q. Yes? A. Take the slack, have to set up tight the slack. Then you put the rest of it enough for the load to pull.

Q. You keep that free end of the rope in your hand just tight enough so that there will be friction on the drum, is that right? A. You hold tight.

Q. Yes? A. See, when you take the slack, before you take the draft in and you taper it only one turn and you take the slack. 86

Q. Yes. A. So this way it won't catch no turn. After you take all the slack, is set tight, then you put the rest of the turn and you pull the draft.

Q. In other words, you pull the free end of the rope off the rope? A. Off the drum.

Q. And it keeps rolling around, rolling around? Is that the way you work it? A. No. The winch is rolling all the time faster than the fall, but the adjustment is on the fall as the draft you go by.

Q. If you want to keep the draft from pulling, you just ease off on the rope, don't you? A. No, you put a hand on top of the turn.

Q. Yes? A. And you hold it, because the drum has got to keep going all the time in order to hold the weight. If you stop the winches, then the turn don't reverse. The weight pulls the winch in reverse. 87

Q. You mentioned something about—you did something so that the turns wouldn't get caught. What is it you do so that that won't happen? A. You take in the slack, as I say, until the fall gets tight. Then you put the rest of the turn enough to pull the draft.

88 Q. Now, do you have to be careful to see that these turns do not ride one over the other? A. No, you don't have to be very careful because the leader is rigging the weight. That comes to the drum on a slant, that the fall never catch him, and the leader was riggin' the proper way.

Q. If the turns, if one of the turns rides over one of the other turns, what happens then? A. You stop the winches.

Q. But if you don't stop the winches, what effect does that have on the work that you do? A. We stop the winches. You can't go ahead.

89 Q. Suppose the winches don't stop but they keep on going and one turn rides over the other, what effect does that have? A. You grab with your hands, like that, and slide it before you go worse. You hold the turn.

Q. But suppose— A. When you hold the turn, the drums running free.

Q. Assume that the one turn overrides the other and binds on the drum, what happens then if the winch keeps on going? A. Well, depending if that keeps on, take the fall, that's all.

Q. Before this accident happened, didn't one of your turns on this drum ride over the other? A.

90 No, sir.

Q. Do you recall before this boom fell down, it was raised up so that it was almost parallel with the mast?

Mr. Fisch: Excuse me a minute.

(Discussion between counsel off the record.)

Mr. Parmer: I am sorry. I am told "recall" is a five-dollar word. I will use a different one.

By Mr. Parmer:

91

Q. Do you remember that before the accident happened this boom which was near you— A. Yes?

Q. —was caused to raise up so that it was almost in a line with the mast? A. No, on a slant.

Q. That is the way it was when it was doing the work, is that right? A. Yes, on a slant.

Q. It was on a slant over the side of the ship and onto the dock? A. Yes. Well, on a slant like that.

92

Mr. Fisch: Just a minute.

A. Spread out on the dock.

Mr. Fisch: May we not—

Mr. Parmer: I will bring it out.

Mr. Fisch: May we have the slant for the record, please?

The Court: Yes.

Mr. Fisch: I do not want to interrupt you, but I want to get the slant for the record, what that slant is.

The Court: Indicate again the slant.

93

By Mr. Parmer:

Q. Indicate what you mean by the slant, what slant it was. A. On the side on the proper way.

Mr. Fisch: Hold your hand there.

Q. Hold your hand there. Hold your hand in the position that you just put it.

The Court: Will counsel say what degree?

Mr. Fisch: What do you say?

94 Mr. Parmer: I should say it is roughly 40 degrees.

Mr. Fisch: All right.

Mr. Parmer: Forty degrees from the horizontal.

By Mr. Parmer:

Q. And it extended over the dock? A. Outside the rail of the ship.

Q. You mean by that over the dock? A. Over the dock, about three feet away from the rail.

95 Q. You say that it never left that position before the accident until it fell? A. Pardon?

Q. And you say that it never left that position until it fell on you? A. Never left the position?

Mr. Parmer: Strike that out, if you will.

Q. It was in that position just before— A. It was in that position.

Q. It was in that position just before it fell on you? A. Yes.

Q. Is that right? A. It was in that position, we were working, while we were working before

96 the accident.

Q. What I want to know then, Mr. Caldarola, is before the boom fell on you whether anything took up from that position that you have just described where the boom extended over the side of the ship and towards the dock? A. Towards the dock?

Q. Did anything happen to it? A. Well, the boom broke.

Q. Yes. Let me show you a picture, Mr. Calda-

rola, and ask you if you recognize it as the Steamship Everagra on which you were hurt as it was right after the accident? A. No, sir. That boom was not like that after the accident. It must have been slide over. It was towards a little more this way, the boom. 97

Q. Is that the ship on which you were hurt? A. Yes, sir.

Q. Does that show the winch at which you were working? A. Yes, sir, over here. There's the Burton.

Q. Does it show the broken boom? A. Is it over here? 98

Q. Does it show it or not? A. Eh?

Q. Does it show the broken boom? A. Well, it's behind the drum. It don't show now, but that boom was laying over here, and this was way up.

Q. You say the boom was in a different place—listen to me—was in a different place after the accident from that shown in the photograph, is that right? A. Yes, sir.

Q. But that is the boom which broke— A. That is the boom.

Q. —which showed in the picture, is that correct? A. Yes.

Q. And that picture shows the deck layout? A. 99
Just a minute.

Q. All right. Take a look at it. A. No, sir. This is not the boom. That is the new boom. There is a riggin' over there, full turn tackle put on. That was only on single, double one run turn. That is a new boom.

Mr. Parmer: May we have this marked for identification, please?

(Photograph marked Defendant's Exhibit A for Identification.)

By Mr. Parmer:

Q. Now, I want you to look at another picture, Mr. Caldarola, and ask you if that shows the ship on which you were working at the time of the accident? A. This is the same ship, the same hatch.

Q. And does that show the winch at which you were working? A. Yes, sir.

Q. Does it show the broken boom? A. Yes, sir.

Q. Does it show it in the place it was after the accident? A. No, that boom was way out; the end of this boom was by my place there.

Mr. Parmer: I offer this in evidence.

Mr. Fisch: No objection.

(Photograph received in evidence and marked Defendant's Exhibit B.)

By Mr. Parmer:

Q. Now, Mr. Caldarola, I want to call your attention to this Exhibit A for Identification, that is the photograph which I showed you first, and which you said did not show the broken boom but showed the new boom. I want you to compare that exhibit with Exhibit B which is in evidence and see if you did not make a mistake. In other words—don't you see— A. Yes.

Q. —that A and B are two pictures of the same thing from a different place? A. No. The riggin' over here and the masthead, see, that's the old boom with only a double running cable. Over here is four. That is where they put it.

Q. Let me call your attention to this, Mr. Caldarola: Here is Exhibit B with the boom which 103
you say was the broken boom. A. Yes.

Q. Here is Exhibit A with the boom which you say is the new boom. Don't you see that this object which you call a new boom, in Exhibit A, is the same object but taken from a different position, as the object which you call the broken boom in Exhibit B? A. Well, here—why you have a different riggin', because you can't see the broken part in here, and behind the drum.

Q. Can you answer that question? Can you see that it's the same thing and in the same place, or 104
not? A. The top here, the small piece.

Q. That is a different thing that we are talking about. We are talking about this long piece. Don't you see it's the same thing in both photographs and the same position, only one is taken from one position and one is taken from another? A. I have a different thing in here, and the riggin' over here is only—and over here is different. It's four turns tackle.

Q. All right. Now, looking at Exhibit A again, do you see that part of the broken boom which was attached to the mast? A. Yes.

Q. That appears at the place where I am point- 105
ing, does it not? A. Yes.

Mr. Parmer: I will mark it, if you please, with an arrow at the end of which we will put the letter "A".

Could I now offer this in evidence?

Mr. Fisch: No objection.

(Defendant's Exhibit A for identification now received in evidence.)

Mr. Parmer: Your Honor, may I show
106 this to the jury now?

The Court: Certainly.

Mr. Parmer: —And suspend the questions while they are examining the photographs?

The Court: Certainly.

(Defendant's Exhibits A and B shown to the jury.)

By Mr. Parmer:

107 Q. Mr. Caldarola, will you look at this B. Is this the drum at which you were working, that I am pointing to now? A. Yes, sir.

Mr. Parmer: I will mark that with a "D."

Q. Will you point out where you were standing in doing your work at that drum? A. I was standing behind the drum.

Q. Let's put a "C", your first initial, to show the place where you were standing. Is that right? A. Yes.

108 Q. Now, this boom which hit you was extending over the dock, correct? A. That is right.

The Court: Over the dock or over the pier?

Mr. Parmer: Over the pier. Shall I refer to that as the pier, your Honor?

The Witness: Not over the pier, but up against the pier; not over.

By Mr. Parmer:

Q. Not over the whole pier or the whole dock, but over— A. Towards the pier. Towards the pier. 109

Q. Yes, across a portion of the pier or a part of the pier. A. Or up against the pier, right up to the door there, not inside there, but just close between the rail of the dock enough, the draft—

Q. Around the pier there is what is called a stringpiece, isn't there? A. That is right.

Q. And that part of the pier is how wide? A. Well, I think it's about four foot, something like that. 110

Q. And did the boom extend over that stringpiece? A. No.

Q. Where were you running the cargo, where? A. On the stringpiece.

Q. On the stringpiece? A. Yes, in the center, about two feet away, two foot and a half away from the ship.

Q. Now, did the end of the boom extend so that the fall would come down on the stringpiece? A. Yes.

Q. You have already told us the angle that the boom had to the horizontal, remember, about 40 degrees we judged it? A. Yes. 111

Q. I want you to tell us what the angle was that the boom had with the length of the ship? A. The length of the ship, there was about ten feet.

Q. Now, assume that this shelf you have in front of you is the length of the ship, and here you have the stringpiece alongside. Now, here you have the boom which you say was at an angle of approximately 40 degrees with the horizontal. Do you understand that? What I want you to tell

us is, what was the angle with the length of the
112 ship? Was it that way, was it that way, was it this way, or what way was it? You tell us. A. Towards—

Q. Do it there. We will judge what you say. A. Towards the back of the ship, like that (indicating).

Mr. Fisch: What angle is that, Mr. Palmer?

Mr. Palmer: I would say it's about an angle of 40 degrees to the perpendicular, that is, the perpendicular being to the side
113 of the ship.

By Mr. Parmer:

Q. Now, I show you this picture. Does that show the place where you were working? A. Yes, sir.

Q. Does that show the broken boom or any part of it? A. Well, there is a piece on top of there and the other one is way in the back.

Q. Can you see the short piece of the broken boom which is next to the mast? A. Yes.

114 Mr. Parmer: I offer that in evidence.

Mr. Fisch: No objection.

(Received in evidence and marked Defendant's Exhibit C.)

By Mr. Parmer:

Q. Now, looking at this Defendant's Exhibit C, will you point out where you were standing and doing your work? A. Behind the drum.

Q. Behind the drum? A. Right there. Behind it. There is the boom, more on this side. 115

Q. Well, wherever you say, you tell me. A little more on the side, right behind it, on the edge of the drum? A. That's it.

Q. Like that (indicating)? A. Yes.

Q. I am putting an "X" there. A. Yes.

Q. That is where you were standing? Correct? A. Yes.

Q. And can you draw a line from this shackle here showing the direction that that boom had with the length of the ship? A. Well, I can't. I am not a painter or something. It comes up this way, like that, the top like. 116

Q. You can't do it? A. It comes across like that (indicating). The end here is placed in here. You can see the length of the cable here, how high it was, way up in the air. When you put that up, they can judge how high in the air it is.

Q. I want to know whether you can give the jury an idea by drawing a line on the picture the way the boom extended with respect to the line of the ship. If you cannot do it, it's all right. Maybe it's too much for you, but if you can— A. I can't.

Q. All right. 117

(Defendant's Exhibit C shown to the jury by Mr. Parmer.)

(A recess a declared, following which the trial was resumed.)

Peter Caldarola—for Plaintiff—Cross.

PETER CALDAROLA, resumed the stand and testi-
118 fied further as follows:

Cross Examination by Mr. Parmer (Continued):

Q. Now, Mr. Caldarola, I want you to look at this Exhibit C again. You recall that this X that is marked on here shows the place where you were standing? A. Yes.

Q. That is where you were standing when you were hurt, is that right? A. Yes.

Q. Now, I am going to put this pencil at the place where the boom joins the mast in the pic-
119 ture and try to put it at approximately what you said the angle was with the length of the ship, or the degrees. A. The boom was something like that.

Q. Like that? Is that the way you put it? A. Right, inshore, towards the rail.

Q. Am I holding—like that? Am I now holding the boom the way you told me it was with respect to the mast? A. This way (indicating).

Q. This way?

Mr. Parmer: May we have the witness show this to the jury?

120 The Court: Yes. Why don't you mark it?

Mr. Parmer: I cannot mark it. He cannot draw a line.

The Court: Let him step down.

(The witness left the stand and stood before the jury.)

By Mr. Parmer:

121

Q. Now, will you hold the pencil against the place where the boom was attached so that the jury gets the idea the way it was? A. Standing like this (indicating).

Q. That is directly over the side of the ship? That is the way it was, right? You have the pencil directly up against the photograph, do you? A. Like this.

Mr. Fisch: Mr. Parmer, what angle would you say that was?

122

Mr. Parmer: The way he showed it?

Mr. Fisch: The way he is showing it now.

Mr. Parmer: Illustrate it. It would be 90 degrees. It would be perpendicular with the length of the ship, at right angles to it. That is what I figured he means. He is putting it like that (indicating).

Mr. Fisch: No; no.

Juror No. 2: No. He is putting it like this (indicating).

Mr. Parmer: I agree with you. Forty degrees still with the horizontal.

123

Mr. Fisch: All right.

By Mr. Parmer:

Q. But what I want you to do, maybe you misunderstood me—

The Court: Keep your voice up now, Mr. Parmer.

Q. I am not trying to get the angle to the hori-
124 zontal. That is the angle to the deck of the ship. That is to the horizontal deck of the ship. I am trying to get the angle with respect to the rail of the ship. Do you understand what I mean? A. Yes.

Q. That is what I want you to illustrate to the jury. A. Well, from the rail to the boom, from here, it was standing close to the roof of the dock. It was reaching up here to the top of the dock, understand, the boom.

Q. Let me show you what I want you to tell
125 us, if you can. I am putting this boom here at that 40-degree angle with the dock or as near as I can get to it. I want to know whether it was this way or this way (indicating). A. No, towards the dock, outside the dock, like that (indicating).

Q. It was toward the dock? A. Toward the dock, to the door. There is a door there, and this boom, way up here, reaches outside the rail by the dock.

Q. Now, as it passed over the rail? A. Passed over the rail, about.

Q. As it passed over the rail at this 40-degree
126 angle, was it like that (indicating) or like that, or like that? A. Toward the forward part of the ship.

Q. Towards the forward part of the ship? A. Like that (indicating).

Q. Just to illustrate it for the jurors, on this mast, would that be the position then? A. No. That is toward the deck. We don't delivery on the deck. We deliver on the dock.

Q. Isn't this forward part of the picture the

forward part of the ship that you just talked about? A. Yes, from where the boom is. 127

Q. Yes? And was the boom at a general angle toward the forward part of the ship? Is that what you are telling us? A. On the dock.

Q. On the dock? A. On the dock. That is the aft part of the ship. This is the fore part of the ship, and the boom was standing right to this door here.

Q. Which door? A. Over here (indicating).

Q. Can you mark the door? A. No, you can't see the door. The picture don't take the door.

Q. Mr. Caldarola, I will draw a line. You tell me whether it is correct or not. This is the line which the boom has with respect to the rail, and I want you to tell me whether the line is correct. Is that right? A. No, it was above, but it was in that plane, you understand? 128

Mr. Parmer: I will withdraw the question.

Mr. Fisch: Let him draw the line.

Mr. Parmer: If he can, I'd be glad.

By Mr. Parmer:

Q. Can you draw the line? A. How can you draw here? It comes up this way. 129

Mr. Fisch: All right, draw it.

The Court: You lawyers had better describe that, because it is meaningless on the record.

Mr. Parmer: Let us mark the line the witness just drew. This is on Exhibit C, and we will put a "C" at one end and a "C" at the other.

Mr. Fisch: Take that off.

130 Mr. Parmer: We will need an eraser.

Mr. Fisch: I think I can give you one.

By Mr. Parmer:

Q. Mr. Caldarola, I want you to look at Photograph B. Do you suppose that you could mark it better on that or could you point to the door toward which this boom extended? A. This.

Q. Now, would you mark that, please?

Mr. Parmer: Now, we had better—this

131 is Exhibit B—We had better mark that "B" for boom. We already have "C" on it.

All right, will you resume your place on the stand, Mr. Caldarola, please?

(At this point the witness resumed the stand.)

By Mr. Parmer:

Q. Now, Mr. Caldarola, if the boom was in the position that you have marked in Exhibits C and B and broke at the place shown in the photograph,

132 don't you see that in breaking it couldn't hit you? A. Certainly.

Q. Can't you see that? A. Why, certainly. First of all, that boom there, it was not in position at the time the accident fell. That boom has been removed. Everything been removed in different position.

Q. I don't mean the broken boom. A. Yes.

Q. I am talking about the boom itself, if it was in the position as you have described as marked on

the photographs just before the accident happened and it broke right near that iron part, as you see 133
in the picture, don't you see that this on breaking was to one side of the place where you were standing? A. Well, it broke there, right where I was standing. Of course the boom,—I can't exactly tell you if I am knocked unconscious—I can't tell you exactly how that boom hit me.

Q. No. A. Probably ask the witness. I can't tell exactly how that boom hit me. I was knocked unconscious underneath.

Q. I want to know whether you cannot remember that something happened to that boom beside 134
just breaking while it was extended over the dock. Don't you remember something happened to that in order to get to a place where it could fall and hit you where you were standing? You don't remember that? A. No.

Q. Did this boom, when it fell, hit you on the back of the neck? A. It fell on top of the head. I fell right on top of my head, all this side here, and knocked right out in a second. That I can tell you very much.

Q. Is this the part of the head it hit you, near the back of the neck? A. Oh, on the side here. This is all sharp pain. 135

The Court: Indicating the right side of the head.

The Witness: The right side.

Q. Is that where the boom hit you, on the right side of the head? A. On top here and on back here. I had that pain on one side, bleeding.

Q. Have you been able to earn any money at all since your accident? A. No, sir.

Q. Did you have some money saved up upon
136 which you have been living? A. Well, my children—

Mr. Fisch: Wait a minute. That is objected to, your Honor.

The Court: Sustained.

Q. Did you say that you have been taking care of a house? A. Taking care of a house?

Q. —In your direct testimony? A. My home—

Q. What? A. My home, my home, doing something in the home.

137 Q. Oh, I see. You merely work around your own home? A. Take the can up.

Q. What? A. Take the garbage can out.

Q. I see. Is that a one-family house? A. Yes, sir.

Mr. Parmer: That is all.

Mr. Fisch: That is all.

(Witness excused.)

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138 VINCENT RUSSO, residing at 1534 Benson Avenue, Brooklyn, N. Y., called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Fisch:

Q. What work do you do, Mr. Russo? A. Stevedoring.

Q. How old are you? A. 28.

Q. And for how many years have you been doing stevedoring work? A. Six years. 139

Q. At the present time, by whom are you employed? A. John T. Clarke.

Q. What is their business? A. Stevedoring.

Q. Have you worked before you came into court this morning? A. I did.

Q. How much of a stretch? A. I worked all last night.

Q. Do you occupy any position in stevedoring, any special kind of work that you do? A. I am a crane driver.

Q. Crane? A. Crane driver. 140

The Court: Keep your voice up, Mr. Russo.

Q. Do you remember on Jaunary 27th, a little over a year ago, when Caldarola, the witness that was on the stand before you, was hurt? A. I do.

Q. Were you working on that shift that he was hurt on? A. I was.

Q. What work were you doing there? A. I was the hatch foreman.

Q. Was it the ship Everagra? A. The name of the ship? 141

Q. Yes. A. I believe it was.

Q. What hatch were you working at? A. Well, that day we worked two hatches, No. 4 hatch, and we were shifted over to No. 3 hatch.

Q. Will you describe just what your duties were? What did you have to do? You told us what your title was. What was the nature of your work? A. Oh, I had to make sure that the gang kept working to get the cargo out of the hatch, place it on the dock in the right places.

Q. At the time of the accident what hatch were
142 you working at? A. No. 3 hatch.

Q. How many men did you have in your gang? A. Thirty-two.

Q. Some were where? A. Some were down the hold, five on deck, eight down the hold, and the balance on the dock.

Q. What were you loading or unloading? A. We were discharging.

Q. What was it you were discharging or unloading? A. Cocoa beans.

Q. Where were the cocoa beans located in the
143 ship? A. In the lower hold.

Q. Did you have a tween deck there? A. We did.

Q. Now, the cocoa beans were taken out how? Did you use a net or a sling? A. We used slings.

Q. How many to a draft? A. Nine bags to a draft.

Q. A draft means the amount of cargo that you take or put in at one time, is that correct? A. That is correct.

Q. Now, how many booms were there at No. 3 hatch? A. Two booms, Burton and the up-and-down.

Q. The Burton boom is used for what purpose?
144 A. To discharge the cargo onto the dock, from the ship to the dock.

Q. Does the Burton boom swing? A. It doesn't.

Q. How do you get it onto the dock then? A. Well, it comes from down a hatch, down a hold, up with the up-and-down, is taken over by the Burton right into the dock.

Q. Do you say the Burton boom is stationary? A. Both booms are stationary.

Q. The only thing is the fall from the Burton

takes, pulls the pulleys through the up-and-down to the place where you want to take it, is that it? A. That is correct. 145

By the Court:

Q. What does the fall do, swing inshore? A. There's two falls, one on the up-and-down and one on the Burton. When he picks it up with the up-and-down, the fall from the Burton pulls. Because he is pulling, the fall from the up-and-down slackens off, they meet together, and down at the dock it goes. Two men takes to operate that. 146

By Mr. Fisch:

Q. How many men did you have at the winches? A. I had three men at the winches, one on the gangway, and one relief man.

Q. Let us talk about the winches. How many winches are there at that point? A. There's only one winch.

Q. Well, are there drums or niggerheads? A. That's right.

Q. How many? A. Two of them.

Q. Did you have one man operating the winch? A. I did. 147

Q. And a winch is what? A. Steam.

Q. A winch is a mechanism that controls the movements of the booms and the falls, and so forth, is that right? A. That is right.

Q. Its power is steam? A. That is correct.

Q. Then did you have a man at each of the niggerheads? A. That's right.

Q. I show you a photograph marked Defendant's Exhibit A and I'd like you to step down here,

please, and show us the niggerheads and which is
148 the Burton and the other, the up-and-down.

(Witness leaves the witness chair and stands in front of the jury box.)

Q. I will hold it up. You can do the showing. A. These are the niggerheads. That is the Burton niggerhead. That is the up-and-down. This is the Burton boom, and this is the up-and-down boom.

Q. Now, what are those drums in between?

A. They should not be there. That probably must be oil or something.

149 Q. What are those round cylindrical objects here? What is this here? A. That is also a niggerhead.

Q. But the niggerhead that catches this one is where, you say? A. Is on the other side, the up-and-down.

Q. Does it show in here? A. This is the up-and-down, yes.

Q. The extreme end? A. That's right, both extreme.

Q. Will you make a letter "X" on both of them, please, with the red pencil? Now, we have got a
150 boom that is lying down, apparently the broken boom. Which is the broken boom, the up-and-down or the Burton? A. The Burton.

Q. Will you put the letter "B" on the boom, showing it's the Burton?

(Witness marks as directed.)

Q. Now, can you see the up-and-down boom on this photograph? A. (Pointing.)

Q. Put a letter "U" on it.

(Witness marks as directed.)

151

Mr. Fisch (to the jury): You will be able to see it later on. It is all marked.

By Mr. Fisch:

Q. How did you have these booms rigged? Can you give us an idea as to the degree or angle, with reference to the ship? A. I don't know what you mean, how I could describe an angle.

Q. Now, if I gave you a pencil and you assume that this part is the deck of the ship— A. Yes.

152

Q. And you have got your winches and you have got your hatch, you can do it any way you want. Assume that. You have to assume that this is the deck, flat. Take your pencil and show us the angle that the boom— A. The ship was, to my way, was in this way, toward the bulkhead.

Q. Just a moment. A. This would be the dock.

Q. This would be the dock? A. That's right. The Burton was at this angle.

Q. That is the boom? A. That's right.

Mr. Fisch. I think it's about, say, 40 per cent angle.

153

Mr. Parmer: Forty per cent with a horizontal deck, and I should say he has about 40 per cent to the perpendicular, 40 degrees from the perpendicular, drawn to the length of the ship.

By Mr. Fisch:

Q. Now, when had you started doing your work on this ship? Was it the day of the accident or

some time before then? A. The time we started
154 the other hatch?

Q. No. When did you start to work on the ship? A. Oh, about four or five days.

Q. Had you ever used the hatch No. 3 before? A. No, sir.

Q. Is this the first time you were using it? A. That's right.

Q. Did you rig these booms? A. We did not.

Q. Did you find them rigged? A. That is correct.

Q. In that position? A. That is right.

155 Q. Was that the usual and customary position of booms? A. That's right.

Q. What time of day did you start to work at No. 3 hatch? A. I think we started in the early part of the morning; about 10 o'clock, we had finished the other hatch, No. 4, we shifted over to No. 3.

Q. Did you change the position of these booms from the time you started to work at 10 o'clock until Caldarola was hurt? A. No, sir. There was a gang working there the previous day.

Q. Did you change the position? Listen to the question, Mr. Russo. You started to work at 10
156 o'clock? A. That's right.

Q. Did you change the position of those booms— A. No, sir.

Q. —from 10 o'clock until the accident occurred? A. No, sir.

Q. What time was it the accident happened? A. It was right after lunch, about 20 after, 25 after.

Q. After what? A. One o'clock.

Q. Tell us how it happened, please. A. Well, when we started in the afternoon, they took out the draft. As it was coming up, it was going across

to the dock, and all of a sudden, as I was coming along, I heard a snap, and down came the boom. I saw he got hit on the head, and he went down. He went out like a light. So, I ran right out to get an ambulance. 157

Q. How far were you away from the place where this boom snapped? A. About three or four feet. I was coming toward it.

Q. You say you were talking out this draft of cocoa beans, is that correct? A. That's right.

Q. Had the draft come out of the hold? Was it resting above the square of the hatch? A. It was.

Q. Had it reached the pier yet or had it not? A. No, sir. It had not reached the pier yet. 158

Q. Was the draft wholly where the ship is? I mean, did any part of the draft leave the area of the ship? A. No, sir.

Q. How far above the deck of the vessel was this? A. It was between the hatch and the side of the ship, right off the hatch.

Q. Could you, if I showed you this photograph marked Defendant's Exhibit A—is there any part of that ship that you could mark that would show where the draft was at the time it snapped? A. I can.

Q. Make the letter "D." That will stand for "draft." A. Just about there. 159

Q. And how many feet was it from the deck? A. Just about right—just about that high off the railing.

Q. Railing is one thing, deck is another. How many feet off the deck? A. I don't know. I don't remember how high the railing was.

Q. Assume that the railing was three feet high, was it over the railing, above the railing, or below

the railing? A. That would be three feet above the
160 railing. It would be about six feet.

Q. Six feet above the deck? A. That's right, above the deck.

Q. The draft, although having these bands, you say you used slings? Is that correct?— A. That is correct, slings.

Q. Was held in position or was being moved by the falls, by the cables, is that correct? A. I don't know what you mean by that.

Q. The cables held the draft in position, did they not? A. That is right.

161 Q. And these cables connected with the top of the boom, is that correct? A. That is correct. it wasn't cables. It was rope.

Q. All right, rope. What sort of rope? Was it manila or sisal, if you know? A. I don't know. I wouldn't know what they are.

Q. You don't know? Now, did you examine those broken ends of the boom? A. I did, when I come back.

Q. What did you find? Tell us what you saw. A. Well, when we went over to look at it, to see how a thing like that would happen, we saw that boom was just eaten away; it was rotten.

162 Q. Did you put your fingers to it? A. Yes, we touched it; just like as if it was sawdust, rot, wood you could pick out of the ground that was in dirt for a year or something; just melted away.

Q. Was it on one part of the boom or more than one part? A. It was more than one part. It was just a little piece that was good.

Q. Just a little piece that was good? A. If you take the whole thing, round, almost about three-quarters baked in.

Q. When you say "almost about three-quarters

baked in," what does it mean? A. I would say three-quarters of that there end there was rotten. 163

Q. And in the manner in which you described before that the wood was? A. That's right.

Q. What did you say? A. It was like sawdust, like sawdust; when you touch rotten wood, it just eats away. You can just drop it down on the deck. In fact, there was plenty on the deck.

Q. You found that in three-quarters of the boom? A. Around one end. Three-quarters is right.

Q. What was your duty there at that time of the accident? A. Hatch foreman.

Q. Hatch foreman? When the ambulance arrived, did the ambulance take Caldarola? A. Well, I stood up at the deck. Two men helped him down. I stood up on deck, because I had to keep the gang moving over, because we shifted to No. 2 hatch. 164

Q. What niggerhead did Caldarola operate? A. The Burton.

Mr. Fisch: That is all.

Cross Examination by Mr. Parmer:

Q. Mr. Russo, was this a Moore-McCormack pier that this boat was at? A. I don't know if it was Moore-McCormack. We work for the Jarka Stevedoring Company. 165

Q. Was it your business when you got to this No. 3 hatch and before you began to work there to look at the rigging and to satisfy yourself that it was proper for your work? A. Well, it was rigged up all right. I mean I had five deck men. They checked everything.

Q. What is that? A. My deckmen checked up.

Q. That was part of your business, to check it,

to see that it was rigged the way it needed to be,
166 in order to do your work? A. That is correct.

Q. You did check it or had your men check it? A. We had everything checked.

Q. And it was satisfactory to you? A. That's right.

Q. And then you continued with the way it was rigged already? A. That's right.

Q. Were you coming toward Caldarola at the time that the accident— A. Not toward Caldarola, toward No. 3 hatch.

Q. In which direction were you proceeding, for-
167 ward or aft? A. I was coming from aft up forward.

Q. I show you this Exhibit A. Does this show where you were when the accident happened? A. That's right. Right there, near this hatch here. Right over here.

Q. Will you point it out on the picture? A. Right about over here.

Q. All right.

Mr. Fisch: Put the letter "R."

Mr. Parmer: I think it would be good, too. Let me see if we can get it in the
168 right place.

By Mr. Parmer:

Q. Do you want to put it down? A. Over here (indicating). Putting it this way, you'd have—I say underneath the boom. It's a little back further.

Q. You put the "R" to denote the place on deck where you were when the accident happened. A. That's right.

Q. You were proceeding, that is, facing in the direction where the winch was? A. That is correct. 169

Q. About how many feet aft of Caldarola were you when the accident happened? A. About three, four foot.

Q. Now, who were the other men who were working on this winch? A. I don't think I know the last names: Mike, Phil, Joey, Pete.

Q. There were three men working on this winch? A. Three men on the winch.

Q. Yes. The other men besides Caldarola were two? A. That's right, on the winch. 170

Q. Now, who were they? A. Phil Fagiano was on the steam. Paul Paganano was on the up-and-down.

Q. Are either of those men in court? A. I don't know. I don't see them here.

Q. At the place where you were standing when the accident happened, could you see those men? A. My men?

Q. No, Fagiano and Paganano. A. At that angle there?

Q. Yes. A. I didn't come on, look. I didn't expect anything to happen. I just had to watch everybody. I was just coming along. 171

Q. Do you mean by that that you did not see at that time what they were doing? A. Well, Fagiano, the man on the winch, don't shut the steam off at all. It continues to run all the time.

Q. The question, Mr. Russo, is simply this: Could you see those men at the time that the accident happened or couldn't you? One or the other. A. You probably could see the winchman, the steam man.

Q. Did you see him? A. Well, I didn't look
172 there.

Q. Did you see the man at the other niggerhead at that time? A. No, sir.

Q. Did you take any notice of what Mr. Caldarola was doing just before the accident? A. No, sir.

Q. Your attention was called to this when the boom broke? A. That's right, when it snapped.

Q. When it snapped? A. When it snapped.

Q. Were you observing what happened to the boom before it snapped? A. Before it snapped? I told my man it wasn't a strong boom.

Q. That is not what I asked you, Mr. Russo. I
173 want to know whether, before the boom snapped, you saw what was happening to the boom. A. Before the boom snapped I saw what was happening?

Q. Yes. A. I didn't see what was happening to the boom.

Q. Were you looking at the boom before it snapped? A. No, sir.

Q. Now, after the accident and after Mr. Caldarola was cared for, you went over to where this boom was in order to find out what caused the accident? A. That is right.

Q. And did you make an inspection of things
174 besides the boom? A. Anything else beside the boom?

Q. Yes. A. The main interest was the boom.

Q. Well, did you look at that portion of the boom which was still on the mast? A. I did.

Q. What did you observe about that? A. It was rotten.

Q. What did you observe about the metal? A. The metal? We looked at the whole thing. I guess probably it was twisted a little.

Q. Now, I want to show you this picture and ask

you if that was the picture of what you saw when you examined the metal part after the accident happened? A. Well, that is all I can say about the metal parts right now. I think it had that little twist. 175

Q. Will you answer my question? Does that picture show what you saw immediately after the accident, with respect to the metal part? A. I don't think I can answer you that question, unless you show me three or four pictures of the same thing here.

Q. Take a look at that Defendant's Exhibit C which is already in evidence; see if that helps you. A. What was the question again? 176

Mr. Parmer: Well, I think the stenographer will read it.

(Last question read.)

A. That's right.

Mr. Parmer: I ask that that be marked in evidence.

Mr. Fisch: We consent.

Mr. Parmer: All right. 177.

(Photograph received in evidence and marked Defendant's Exhibit D.)

By Mr. Parmer:

Q. Now, does that picture show the twist in the metal part which you referred to? A. That shows the twist.

Q. Do you also see this mark on the gooseneck? A. I do.

178 Q. Was that there at the time? A. I don't recall.

Q. You don't recall it? A. I don't recall if that little piece was there.

Q. You call that a piece. That is a mark, isn't it, a mark in the metal? A. It could have been put there after this boom cracked. My main interest was, what are we looking right over here? Right where that rotten part was, that was the main thing: How a thing like that could crack. It's rotten, if they leave a boom on there like that.

179 Q. Were you interested in finding out what caused the boom to twist? A. Well, probably when it come down, you know, anything can twist a little.

Q. Were you interested at all in determining what made that mark— A. No, sir.

Q. —on the gooseneck? A. No, sir. Could have been done after.

Q. Mr. Russo, I want to correct something which was probably an error. This place where this mark is, in Exhibit D, that is wood, isn't it? I referred to it before as metal. That is actually wood, and the metal part is this ring that goes around. Isn't that correct? A. No. That—

180 Q. Just to make it clear to you, isn't this gooseneck a pin which goes right through the wood? A. That's right.

Q. So that this place where the mark is is wood? A. I can't see it. No. I don't. I mean I can't see what is holding the boom then if that is a piece of wood. How could that pin hold the boom, this little piece there? I think that is a whole cup.

Q. You think that is a metal cup? A. I think so.

Q. On Exhibit D, we'll put an arrow leading to the mark that we are talking about. A. Yes.

Q. And put at one end the letter "M." A. What does that mean, M? 181

Q. Right? A. What does it mean?

Q. That is just a letter that we take to identify it. It doesn't mean anything in particular. You can take anyone you want. Mr. Russo, when you saw that twist in the boom at the gooseneck right after the accident, didn't you know at that time from your experience as a longshoreman that a twisting strain had been put on that boom? A. I am telling you, when the boom fell, it could have happened; anything could have happened. Doesn't have to be a twist that does it. 182

Q. There has to be a twisting at some time. A. It just happened, that's all, that twist.

Q. That is when the boom—your understanding was that, when the boom broke at the place shown in the photograph, while the cargo was suspended on it and the long part crashed to the deck, it hit Mr. Caldarola, the part next to the mast in some way got twisted in falling. Is that what you mean? A. Right.

Q. And the only distance it fell was the distance that it traveled through the air from the place that it was over the deck up against the mast? A. That ship was so old, I am surprised nothing else fell. 183

Mr. Parmer: I move that that be stricken out.

The Court: It may be stricken.

Q. And didn't you realize, from your experience as a longshoreman, Mr. Russo, that this mark shown in Defendant's Exhibit D was caused by reason of the fact that the boom had been forced up against the nut which you see on the top of the shackle? A.

If that boom went straight up in the air, it wouldn't
184 have the twist on it; it couldn't go near the nut.

By the Court:

Q. The question was, did you realize that, based on your experience as a longshoreman? A. I am telling you, what I was most interested in was the rotten part of the boom.

Q. Did you realize that on the basis of your experience as a longshoreman? Yes or no. A. I guess not.

185 Q. You say you guess not? A. I don't realize it at the time.

By Mr. Parmer:

Q. I want to point to that nut. This is the nut that we refer to. I am putting an arrow to it and we will put alongside the arrow the word "nut." That is the nut that you understand we were referring to? A. Yes, that's right.

Q. Do you know where either of those other men, Mr. Paganano or the man who was at the steam are now? A. Where they are now?

186 Q. Are they in New York? A. I don't know.

Q. Have you seen them recently? A. I saw one of the fellows about a week ago.

Q. Which one was that? A. Fagiano.

Q. He was at the steam? A. He was—no. He was the steam man, that's right.

Q. Do you remember a man by the name of Forti? Was he working in your gang? A. That's right.

Q. Is he here? A. I don't see him. I don't see him.

Mr. Parmer: That is all.
The Court: Any questions? 187
Mr. Fisch: No.

(Witness excused.)

The Court: Call your next witness.

JOSEPH R. RUSSO, residing at 63 Bay 14th Street, Brooklyn, N. Y., called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows: 188

Direct Examination by Mr. Fisch:

Q. Mr. Russo, are you the brother of the last witness? A. Yes, sir.
Q. How old are you? A. 22.

The Court: Keep your voice up. Talk up.

A. 22.
Q. And what work do you do at the present time? A. I am a crane driver, deckman, most anything 189 in stevedoring.
Q. Whom do you work for? A. I work for Jarka.
Q. You do not work for the same concern your brother works at the present time? A. Well, on and off I do.
Q. How many years experience have you got in longshore work? A. Longshoreman, two years; on deck, three years.
Q. What does that mean? A. I am a seaman. Merchant Marine.

Q. How long were you in the Merchant Marine?
190 A. About three years.

Q. Do you remember the day of the accident to Caldarola? A. I do.

Q. How long ago was that? A. I'd say about a year ago.

Q. Would you speak louder?

The Court: Can't you do any better than that Mr. Russo? Can't you talk up?

Q. What work were you doing on that ship? A.
191 I was on deck, relief man. I am supposed to relieve the other men. When they are on there too long, I just relieve them for a smoke.

Q. How long do they work before you give them relief? A. Half hour, an hour.

Q. And how long does your relief work take place? I mean, how long during the— A. Keeps going all around, go back to the first man.

Q. How many men do you relieve? A. There was four on deck. I think four men besides me.

Q. What hatch were you at? A. On No. 3, when it happened.

Q. Were you doing any work at the time the
192 boom broke? A. No, I was not.

Q. How far were you away from the boom? A. I was on the opposite—I was near the up-and-down, the niggerhead, standing there, watching that draft go out. In other words, I have a half hour off. I can stand around, do nothing.

Q. How near were you to Caldarola in feet? A. I'd say right in back of you there, at the end of the hatch.

Q. At the end of this— A. Just about there.

Q. —(pointing) partition? A. Yes.

Q. From where you are? A. Yes.

193

Mr. Fisch: That is something I am going to get.

The Court: We will have it in a minute. From the witness chair to the jury rail—

(Court Attendant measures the distance and announces, "Thirteen feet, six inches.")

By Mr. Fisch:

Q. Did you see the accident? A. Yes, sir.

Q. Tell us what happened, please. A: I was looking down the hold of the ship, as the draft come up. It was going at normal speed. When it got over the hatch on top of the deck, that is when the boom snapped; boom come down. I saw Pete on the floor. So I ran over to him. He was unconscious. That's all.

194

Q. This draft you told us about came out of the hold. Do you know where the square of the hatch is? A. Yes.

Q. How far away was the draft from the square of the hatch when this boom broke? A. I'd say right in the center of the deck, from the square to the outboard like where the rail is.

195

Q. We will start with one thing at a time. The square of the hatch was how many feet long and how many feet wide, about? A. I wouldn't know.

Q. Anyway, was it a square hold? A. A square hold.

Q. Now, the cocoa bags or beans contained in the bags were taken out of the hold by the up-and-down, is that correct? A. Yes, sir.

Q. Had the Burton boom taken hold yet when

the accident happened? A. Well, can I describe it?

196 Q. Yes, please. A. The draft came up on the up-and-down. When it came over with the Burton, she got on top of the deck. The up-and-down was slackened off the same time it was going even like that (demonstrating) when it hit on top of the deck, and that is when she went down.

Q. Had the Burton taken hold yet? A. Yes, it was dragging it in when it snapped.

Q. It was dragging in what direction? A. Inshore to the dock.

Q. Towards the dock? A. Yes.

197 Q. How many feet in your opinion had the Burton dragged or moved? A. It's not dragged, really.

Q. It was not on the deck, was it? A. No, it moved.

Q. Moved through the air, is that right? A. Yes.

Q. How many feet had the Burton moved this draft through the air when the boom snapped? A. I will say about five or six feet, got on top of the deck. It passed the hold. It was on deck.

Q. Did you examine the boom after the accident? A. I went to see what happened. I went over to the boom. I was looking at the piece right here that broke. I didn't look at the boom itself. I saw

198 where it broke.

Q. I mean the broken part. I meant to ask you that. Yes. A. I saw the part that was broken.

Q. What did you see? Tell us. A. I tell you the truth, it was like sawdust. I never seen a boom on any ship like that. I had a hook in my hand. I just picked it out like that. It kept falling like sawdust.

Q. You just picked, what? A. I was just picking out the wood, like that.

Q. With the hook? A. Yes.

Q. You say it was falling out like sawdust? A. Yes, it was. 299

Mr. Fisch: That is all.

Cross Examination by Mr. Parmer:

Q. Did you follow the course of this draft— A. As it came out of the—

Q. I hadn't finished my question, Mr. Russo. Did you follow the course of this draft from the hold, as it went up in the air and as it went over towards the side of the ship up until the time the accident happened? A. Yes, sir. I followed that draft perfectly. 200

Q. And while you were following the course of the draft, did you observe what the winchmen were doing? A. I was looking all around. They were doing the right thing. I was myself looking at the draft too. I was looking at the draft, just looking all around, winchmen and all.

Q. While you were looking at the course of the draft, could you also keep your eyes on the winchmen? A. No.

Q. Did you see anything happen to the Burton boom before it broke? A. No, sir. 201

Q. Were you looking at it? A. As the draft was coming up?

Q. Were you looking at it just before the accident happened? A. No, I never noticed anything.

Q. What I asked you was this: Just before the accident happened were you looking at the Burton boom? A. No, sir, I was not looking at it.

Q. You can't tell us then, can you, whether the Burton boom was drawn up so that it was almost in a line with the mast? A. The Burton boom?

Q. Yes. A. How do you mean? I don't know
202 what you are talking.

Q. Well, just to illustrate, assuming that is the mast (indicating) and that is a boom (indicating), can you tell us from what you saw there whether the boom was caused to go up and assume that position? Do you know? A. Yes. The boom would not go up that way.

Q. What? A. A boom wouldn't go up in the air.

Q. I didn't ask you whether it would or not. Did you see that happen? A. Did I see it go up in the air? No, sir.

203 Q. Were you observing closely enough so that you can tell us whether that happened or not? A. Yes, sir. I can tell you it did not happen.

Q. You are telling us it did not happen? A. The draft came up with normal speed. Nothing was jerked or anything. The boom just cracked. If he jerked it, the boom had to crack. The up-and-down would have broke up.

Q. Would you say that again? A. If he jerked altogether like that, everything would have broken, but the draft was coming up at a normal speed. Nothing was jerked.

Q. When you said, if he jerked, you put your
204 hands, your clenched hands together like that, didn't you? A. Like this here (indicating).

Q. What you are trying to illustrate there is that if the Burton boom and the up-and-down fall began pulling against each other, isn't that what you mean? A. At a certain speed, it would jerk up good and hard, but it was in the air. There was no jerking going on. If was just going at a normal speed and just dropped right there. He couldn't have jerked it.

Q. Just let us answer the question. When you put your hands like that,— A. Yes? 205

Q. —you mean if one fall pulls against the other, don't you? A. Yes, sir.

Q. And if one fall pulls against the other, the draft goes up in the air? A. No, it does not. This fall ain't going to pull against the other one. You pull on this fall, this fall stays the way it is (demonstrating). You pull on the Burton fall, it comes over like this, see (demonstrating)? It does not pull away from nothing.

Q. If the two falls pull against each other, you tell us that the draft would not go up in the air, 206 and do you also tell us that the boom would not go up in the air? A. You said the boom would go up in the air like this (demonstrating). You have a draft on the boom. When there is a heavy weight on the boom, it can't jump up, if you have got your weight there. I never seen a boom go up in the air. I seen a boom go this way and that way (demonstrating).

Q. You are telling us now that it couldn't happen? A. It couldn't go up in the air.

Q. That is what I mean. A. That's what I am trying to say.

Q. Did you also see the condition after the acci- 207 dent, shown in this Defendant's Exhibit D, of the twist in the boom at the place where it joined on the mast? A. This twist right here on top, where the pin is?

Q. You are turning to the twisted place. Yes. A. I noticed that, yes, sir.

Q. Did you also notice this mark to which an arrow points and the letter "M"? A. No, sir.

Q. Did you know a man by the name of Forti who was working there that day? A. Yes, sir.

Q. Wasn't he the relief man?' A. No. Mike
208 Forti is a gangway man.

Mr. Palmer: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Fisch: Then we offer in evidence, without objection from my worthy opponent, both records, both hospitals.

(Hospital records of the St. Peter's Hos-
209 pital received in evidence and marked Plaintiff's Exhibit; Dr. Spalding's record received in evidence and marked Plaintiff's Exhibit 3.)

Your Honor, I think I have run out of ammunition.

The Court: Ladies and gentlemen of the jury, by reason of the meeting of the Board of Justices, set for 2 o'clock, we will adjourn court until 10 o'clock tomorrow morning.

Do no discuss the case among yourselves nor permit anybody else to discuss it with
210 you and do not visit thhe scene of the accident.

Please be in your places promptly at 10 o'clock tomorrow morning, Trial Term, Part VI, Room 331.

(Whereupon an adjournment was taken until Wednesday, June 6, 1945, at 10 A. M.)

Wednesday, June 6, 1945.

211

TRIAL RESUMED.

(Same appearances.)

The Court: As I understand it, Mr. Fisch, you will rest your case now except for your medical?

Mr. Fisch: Yes, your Honor.

The Court: We are having a little difficulty with the doctor. One will be here at 11 and one will be here at 12.

212

Mr. Parmer: Except for the plaintiff, calling the plaintiff on the plaintiff's case for the purpose of testifying in connection with the model.

The Court: The plaintiff will be recalled on the plaintiff's case.

Mr. Fisch: He will be here in a few minutes.

The Court: All right.

Mr. Parmer: Shall I wait for him, your Honor?

213

The Court: Just as you please.

Mr. Parmer: I'd prefer to wait for him and get through with that, your Honor.

(Recess declared.)

The Court: Mr. Parmer, I think you had better go on with your proof. We cannot wait too long.

Mr. Parmer: Very well

214 The Court: You are going to reserve your motions till the close of all the plaintiff's evidence?

Mr. Parmer: Yes, your Honor.

The Court: All right.

DEFENSE

SERGEJS BOLS, of 19 Rector Street, New York City, c/o Thor Eckert, called as a witness in behalf of the defendant, being first duly sworn, testified
215 as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Bols, are you a—

Mr. Fisch: Sergejs.

The Court: Bols is the first name.

The Witness: No.

Q. The first name is Sergejs? A. That is right.

Q. Are you a Master Mariner? A. That is right.

Q. And are you captain of some vessel now? A.
216 Yes.

Q. What vessel are you captain of?

The Court: You will have to do better than that, Captain. Speak up so that gentleman there in the gray suit can hear you. Way up, now.

A. Panamanian Steamship Everagra.

Q. That is the vessel that we are concerned with in this case, is it not? A. Yes.

Q. Who employs you? A. War Shipping Administration. 217

Q. Where were you born, Captain? A. I was born in Russia.

Q. What part of Russia?

By the Court:

Q. Sit back, Captain. How do you give orders at sea? Let me hear how you give orders at sea. If you want a fellow to go aloft, how do you do that? A. I did not—

Q. How do you order a man aloft? You do not say, "Go aloft," do you? A. Oh, no. 218

Q. You say also, "All hands on deck." Let's have that kind of talk. A. I was born in Russia, in Pomel.

By Mr. Parmer:

Q. What part of Russia is that? A. That is in the middle way, Russia.

Q. Now, were you on board the Steamship Everagra when the accident happened to Mr. Caldarola? A. Yes, I was on board ship.

Q. Had you been on that ship during the day time? A. Yes, I mean I slept during the night aboard the ship. I didn't left the ship that day. I was on board the ship when this accident. I was in my cabin that time. 219

Q. Were you in your cabin when the accident happened? A. Yes.

Q. During the day, had you been out on the deck in the region of No. 3 hatch? A. Yes, I walked past many times.

Q. Now, since you have been in New York on

the first occasion, have you seen this model which
220 is before us in court on the table? A. I saw it yesterday.

Q. Did you take part in making any of the measurements of the ship as a result of which this model was made thereafter? A. Yes, sir, with my chief officer, together.

Q. Did you make the measurements with the chief officer? A. Yes, sir.

Q. Who was present when the measurements were made? A. This gentleman.

Q. That is Mr. Jorda? A. Mr. Jorda.

Q. Same office as the office of the attorneys for
221 the defendant?

Mr. Parmer: Your Honor, I will prove in due course that this is made to scale, but for the moment, I will omit that. I have to connect it up.

Q. Does this model show the constructions of the booms and the hatches? A. Yes, sir.

Q. And the places where they are on the Everagra at No. 3 hatch? A. Yes.

Q. As they were at the time of the accident? A. Yes.

222 Q. During the morning of the accident, did you observe the manner in which the booms were rigged, and so forth while the longshoremen who were there at that time were working? A. Well, I looked, but I never paid much attention to that, because that is officers'—

Q. What? A. My deck officers, they usually take care of those things.

Mr. Parmer: Captain Bols, will you come down here, because I want—

The Court: I want to call your attention to the fact that the plaintiff is back in court now, Mr. Parmer: If you'd like to suspend with this witness, you may do so. 223

Mr. Parmer: Thank you, your Honor, I would. I'd like to get the plaintiff to give his testimony first.

The Court: You may suspend with this witness. The plaintiff is recalled. Have a seat, Captain.

(Witness temporarily excused.)

224

The Court: All right, recall your plaintiff, Mr. Fisch.

(Plaintiff's case, continued)

PETER CALDAROLA, recalled on the plaintiff's case, testified further as follows:

Cross Examination by Mr. Parmer:

Q. Mr. Caldarola, would you stand right here so that you can see this and also this juryman over here won't have his vision interfered with? Mr. Caldarola, this the Captain testified is a model of the ship, and it has been constructed to scale, which we will prove later, with the two king posts, two booms, guys holding the booms, the hatch, and this device here which I point to represents the winch; see the hatch coaming here? A. Yes. 225

Q. Here is the rail of the ship which was nearest to the dock. A. Open rail.

Q. It was an open rail on the ship? A. Open rail.

Q. With that difference, does it look natural to
226 you? A. No.

Q. Wherein does it seem to be out of line? A. The king posts.

Q. Yes? A. That is in further of the drum head.

Q. It was in further? A. Yes, sir.

Q. Closer to this here? Is there anything else? A. That is all. The king posts as close way in to the drum.

Q. You mean closer to this structure? A. Structure—this structure is too big. It's way in a little further.

227 Q. I see. A. The king posts come here.

Q. I see. A. And on this one here.

Q. Do you notice the picture? Do you, Mr. Caldarola? I will call your attention to Defendant's Exhibit C. A. Yes, sir; you see it right behind the drum, the king posts. This is outside the drum.

Q. This thing moves, Mr. Caldarola, when you get it—it's owing to the fact that it's slippery; it slips every so often. When you get it off even on each side, you will notice the drum is in line with the king post (demonstrating with model).

The Court: Have you offered that in evi-
dence yet?

228 Mr. Parmer: This model, I have not, your Honor. I was just about to do it.

Mr. Fisch: No objection.

Mr. Parmer: May I offer it subject to connection?

The Court: All right.

(Model received in evidence and marked Defendant's Exhibit E.)

Peter Caldarola—for Plaintiff—Recalled—Cross.

By Mr. Parmer:

Q. Now, Mr. Caldarola, that we have adjusted this little device here so that it is even on both sides, does it now seem natural to you? Yes? A. Yes.

Q. Very good. Would you mind marking on the model the place where you were standing at the time the accident happened? Put an "X", please, or anything that you want.

(Witness marks the model.)

Q. Would you put a circle around that X, please? Will you do that with red pencil so we'll have no—

(Witness marks with red pencil.)

Q. Now, was the boom which hit you just before the accident in about the position that is shown on this model now? A. Not before the accident, the boom didn't hit me.

Q. You misunderstood what I intended. I want to know whether before the accident the boom was in the position which is now shown on this model. A. No, sir.

Q. In what way did it differ? A. Furthermore, this way.

Q. How much further would you say? Just show the jury how much further. A. This way (demonstrating).

Q. That is about two inches. That is the toe of the boom? A. Yes.

Q. The end of it was about two inches more to the forward part of the ship? A. Forward part of the ship, right.

Q. Forward part of the ship? Now, when the
232 boom broke, did the boom go in this place between the winch and this structure which was between the two posts, the two masts? A. I couldn't explain that. Even a dead man couldn't explain a thing after he is dead. I was knocked unconscious, laying there. How can I tell you that?

Q. You have to say you don't know. A. I don't know.

Q. Very good. You recall yesterday, Mr.—

Mr. Fisch: "You remember."

Mr. Parmer: Excuse me.

233

Q. You remember, Mr. Caldarola, yesterday, that you said, with respect to Exhibit A, that this boom which we see in the picture and which is between the winch and this structure was not the boom which fell down but that was the new boom? A. On account of the riggin' there, it was not the same riggin' as the other picture there, because they have got the other part higher there. You can't see the new one or the old one, but on account of the riggin' there, that is a new riggin', a new boom, that has been in the picture.

Q. That is a new boom? A. On account the
234 riggin' is different riggin'.

Q. You have no idea, Mr. Caldarola, what part of this boom hit you? A. No.

Q. You do have one? A. Yes.

Q. Will you tell us what your idea is? A. Right about here.

Q. We'll mark it.

The Court: A straight line in red pencil.

Q. Straight line in red pencil at the lower end of the boom. Now, do you mean that it was the upper portion of that boom divided by this red line which hit you? A. About. About. I didn't have no rule, or anything like that. About, about this direction. 235

Q. What I mean— A. It is right over my head; this boom was swinging over here and where I am standing the boom was going right over my head.

Q. Mr. Caldarola, what I want to know— A. I mean exactly all I can say, the boom was swinging right over my head to the dock. 236

Q. I want to find out what you mean when you say you have the idea of what hit you. You see, when the boom broke, it divided into two parts. One was the lower or very short part— A. Right.

Q. —and one was the long part above it. Was it your idea that it was the long part above that hit you or the short part below that hit you? A. I don't know.

Q. You don't know? All right. You didn't see where the broken portions of the boom went? A. No, sir, I was knocked right out in a second.

Q. Do you know, have you got any knowledge that the boom hit you at all? A. Well, in the meantime, I was like a—after I got hit, the boom was over my head. 237

Q. When the boom fell, there were some wires attached to it which fell too, weren't there? Weren't there some wires attached to the boom, which fell at the same time as the boom? A. I don't know. I can't explain that. I was knocked out.

Q. You don't know whether the wires hit you or the boom hit you, do you? A. I "prefer" that the boom which was over my head.

Q. You lean towards believing that the boom
238 hit you? A. Yes, sir.

Q. But you don't know, is that right? A. No.

Q. Mr. Caldarola, do you remember that while you were standing at this place marked "X" on the model— A. I was standing, because when we work we clear all our feet—

Q. Maybe you don't understand me. You see this point marked "X" here? Before the accident that is where you were standing, is that right? A. Yes.

Q. Now, while you were standing there, do you
239 remember that the gangway man, Mr. Forti, shouted to you, warned you that an accident was going to happen, and that you stepped back here where I am pointing to now? A. No, sir.

Q. Don't you remember that it was while you were back here, that is, aft of the mast, that you were hit with something? A. No, sir. Nobody warned me. The draft, when it got up this direction here, it went down in less than a second and I got hit and knocked unconscious.

Q. Don't you remember that you sat down on a hatch which was aft of this mast that I am pointing to here, the mast on the starboard side? I
240 will show it to you in the picture, Defendant's Exhibit C. A. I was—when I come out of the "conscious," I was up—they carry me up against the bulkhead here, not this here (indicating), up against the bulkhead; way out there, they carry me.

Q. Don't you remember that the Captain came out? A. No, sir.

Q. —while you were sitting on the hatch, and talked to you? A. That is a liar.

81

Peter Caldarola—for Plaintiff—Recalled—Cross.

Mr. Parmer: That is all, Mr. Caldarola. 241

(Witness excused.)

Mr. Fisch: *Please go back for a minute.* I have a question to ask of you.

Mr. Parmer: You want him to go back?

Mr. Fisch: Yes, please.

(Peter Caldarola resumed the stand.)

Mr. Fisch: Your Honor, there is a question I omitted to ask on direct.

The Court: Go right ahead.

242

Direct Examination by Mr. Fisch (Continued):

Q. Mr. Caldarola, did you have any trouble with your neck before the accident? A. No, sir.

Q. Have you noticed anything about your neck since the accident? A. Yes, sir. Through the doctor, explained me the accident.

Q. Outside of the doctor "explaining you," what can you see about your neck? Can you turn it? A. No, it's stiff, and pains.

Q. Where is the pain? A. Right over here.

By the Court: 243

Q. Indicating the right side of the neck? A. All this part here pain.

Q. Indicating on the head. A. And down in my back here (indicating).

By Mr. Fisch:

Q. You had never had any trouble with that before the accident? A. No, sir.

(Witness excused.)

The Court: All right, Captain Bols.

244

SERGEJS BOLS, resumed the stand and testified further as follows:

Direct Examination by Mr. Parmer (Resumed):

Q. Now, Captain, using this model, Defendant's Exhibit E, would you explain to the jury how the booms and the dericks are used in taking cargo from the hold and putting it over the side on to
245 the dock? If you need any assistance from my hands in holding, let me know and I will be glad to do it. A. There is only two derricks at these hatches, two derricks and one winch with two niggerheads. Instead of wires, the stevedore used three and a half inch manila ropes, and these manila ropes were spliced. They were not spliced together, but each one, both connected in this place together.

Q. In other words, these are the cargo falls? A. That is the cargo falls.

Q. And they are called married falls? A. Married falls.

246 Q. Tied together but not spliced? A. Not spliced, no. They are spliced, each one of them.

Q. Individually are spliced? A. And then they are connected with the shackle.

Mr. Fisch: What?

Q. What is a shackle? A. A shackle is—

By the Court:

247

Q. A block, isn't it? A. No, it is not a block. It is—

The Court: Isn't there one on the picture?

The Witness: Yes, there is on the picture.

Q. Point it out on the picture. That is the easiest way. A. (Indicating) This is a shackle.

By Mr. Parmer:

248

Q. Yes. A. That's it.

The Court: Show it to the jury. You may point it out, Mr. Parmer, to the jury.

Q. It has a pin that goes through it? A. A pin goes through it.

Q. And that is shown on Exhibit D? A. These two cargo falls are held together by means of such a shackle. I forgot to mention every time when a ship arrives in port, ship's crew hoisted the derricks up right in the middle and leave in the mid- 249
dle of the ship; and every time, before starting discharging or loading, stevedore men rig the derricks and falls the way they start to discharge. Then they discharge. In this case they used two men, one man at the steam valve in the middle here and one man, one niggerhead, and another man at another niggerhead with the falls. Well, one of the derricks is usually in the middle of the hold in this case.

Q. That is called the up-and-down, isn't it? A.
250 Up-and-down, yes, like on board my vessel, it's hard to put this derrick right in the middle of the hold because the Sampson post is short and the derricks are short too.

Q. When you say this one, you mean— A. It was a little bit on port side more.

Q. You mean—I want to know for identification purposes—you mean the one on the port side? A. Yes, the Sampson post on port side, and it was made fast with one guy. That is a guy and "preventet" here—wire "preventet" to the railing, and another guy, another side on the first bridge near
251 the derrick was fast. In other words, this derrick was tightened up from both sides. The other derrick was outside.

Q. Now you are speaking of the derrick? A. We call them derricks.

Q. The derricks on the starboard side? A. Starboard derrick was as far outside as it's possible to go. I don't remember exactly how it was, but usually on my ship it is nearly about 80 degrees from this line, otherwise the slings wouldn't go overboard.

Q. Why is that? A. Well, because is short der-
252 rick. It's quite far away from a ship's side.

Q. How long is this derrick on the starboard side, I mean the boom itself? A. As I remember, it's about 20, 22 feet, something.

Q. Twenty-two? And do you recall what the distance is from the Sampson post to the side of the ship? A. No, I don't recall the distance.

Q. Now, I want you to go on and explain to the jury how you transferred by means of this equipment cargo from the hatch and over the side of the vessel on to the dock? A. Well, this case—

Q. Yes? A. The first thing, the man at the port niggerhead starts to heave cargo. I mean winch was working all the time straight, all the time steam on, and winch was working. 253

Q. Let me interject something there. That is, by winding up this fall on this drum here— A. On this drum.

Q. —on the port side, the cargo is made to go up first? A. To go up, and in this case it got up.

Q. I do not want you to tell what happened at the time of the accident. A. Oh.

Q. I just want you to tell in the ordinary course, cargo was transferred from the ship to the side, 254 to the dock. Now we have got the cargo up out of the hold by means of this port winch. What next happens? A. The next thing, men on the starboard niggerhead, yes, he starts to heave the slack.

Q. And this man lets go? A. At the same time, this man not let go, but have to slack easily.

Q. Slack easily? A. Not to let go right away, otherwise this cargo will hit somewhere here on deck and can have some accident. This have to slack and this have to "easily" up.

Q. Yes? A. When it's over the rail bulkhead here, this man lets go his fall. 255

Q. He lets go? A. He lets go this fall, and this man starts to slack down.

Q. Now Captain, while you were in your room, did you hear of an accident that happened? A. I did not hear when it happened right away. Somebody shouted. I mean, my doors were open, both sides, my doors from my—there's my doors, is here, a little passageway.

Q. What do you call this place on the ship? A. Is a bridge, first bridge.

Q. First bridge? A. Over here.

256 Q. That first bridge on the model, Exhibit E, is shown by this structure at the forward end of the ship; that is the block wood at the forward end of the model? A. My cabin doors are here.

Q. So your cabin door fronts right on No. 3 hatch? A. Yes, right in front a little bit on the starboard side, like it's here (indicating). It is not right—my cabin, there is a little passageway; on the left side is a saloon, and on the right side is my cabin.

As soon as this accident happened, somebody
257 shouted,—I don't remember who was it—that there is an accident: A boom break down.

Q. What did you do? A. I run right away outside here, and the first thing I see is my carpenters, also, later, you know, there was boatswain and my mate. First thing I told him, not to touch anything. I asked if there is anybody hurt. Then I saw one stevedore, you know.

Q. Where did you see him? A. I saw him, see, there's two small bunker hatches. I saw him near the first bunker hatch, and there was near—

Q. I want to call to your attention this Defendant's Exhibit C. Did the bunker hatches that
258 you refer to appear upon that picture? A. Yes. There's one and there's the second bunker hatches.

Q. Now, we will mark—that is one of the bunker hatches? A. Yes.

Q. We will put a "1" on that one, and this is the second bunker hatch? A. Second, yes.

Q. We will put a "2" on that. Is that correct? A. Yes.

Q. Where did you see this injured man? A. I saw this man a little bit in this place, about.

Q. Where you are pointing now? A. Yes, it was two men, one man on each side of him, and—

Q. What was he doing? A. He was walking. They were holding him and he was walking over there, and I asked them to— 259

Q. Never mind. We want to get down where you saw him. A. Yes.

Q. Is this the place, right there? A. About the end of one hatch.

Q. That is the after end? A. The after end.

Q. We will put an "X" right there. That is where you saw him, right? A. Yes.

Q. Two men were with him? A. Well, there was lot of men around, but I noticed specially those two men on each side. 260

Q. Did you say this injured man was walking? A. Yes.

Q. Well, where did he walk to? A. I asked them.

Q. No; I want to know where did he walk to. A. Well, they was here, this way.

Q. You mean walking from "X" over towards No. 2 hatch? A. Yes.

Q. And will you tell us where you saw them go? A. No. I asked them—I told them I want to inspect that man. I want to see if I can help anything, to give some medical attention to him; and I asked him to let him sit down on this hatch. 261

Q. You mean No. 2 hatch? A. No. 2 hatch.

Q. Is that what happened? A. Well, then, first thing, I asked him if—

Q. No. I want to know, did he sit down on No. 2? A. Yes. Yes.

Q. What did you do then? A. Well, I asked him if he is hurt.

Q. Yes? A. He was holding—I don't remember right or left hand—somewhere here on the head (indicating).

Q. Yes? A. Well, I took the hand off and I
262 looked all over.

Q. Yes? A. There was no blood. Possibly, maybe there was a little scratch, but I don't remember any more that, but there was no blood, and nothing serious.

Mr. Fisch: We move to strike out the word, "nothing serious."

Mr. Parmer: Well, apparently serious.

The Court: Yes, I will strike it out.

Mr. Parmer: Now, may I show this to the jury, your Honor?

263 I will just explain these marks. There is the No. 1 hatch. There is the No. 2 hatch. "X" is the place where the Captain says he saw him first, and that he walked over from "X" to No. 2.

A Juror: What is the distance?

By Mr. Parmer:

Q. What is the distance between that place on the photograph marked Exhibit C from the place that you marked the "X" over to that No. 2 hatch to which the man walked, approximately? A.
264 About ten feet, 12 feet. I, really I can't say exactly.

Mr. Parmer: Your Honor, another juror has told the officer he wishes to know the distance.

The Court: Let him ask the question. All right, the juror wants to ask a question.

The Juror: Yes. How far is No. 1 to No. 2?

By the Court:

265

Q. Will you answer that question, Captain, from No. 1 hatch to No. 2?

The Juror: Whatever they call it.

A. Well, I really can't say exactly.

By the Juror:

Q. Approximately. A. But it's about 10, 12, or 15 feet, or something like that.

By the Court:

266

Q. Not less than 10 nor more than 15 feet? A. I can't say exactly.

By the Juror:

Q. But no more than 15 feet, no less than 10? No more than 15 and no less than 10? A. I can't say exactly that.

By Mr. Parmer:

Q. While Mr. Caldarola was at No. 2 hatch, did you talk to him? A. Well, I asked him where, 267
tell me if he is hurt, does he have any pain, or anything.

Q. Did he speak to you? A. I don't remember exactly, but I spoke to him, but the other people—

The Court: Can the witness go back to the chair now?

Mr. Parmer: Yes, I believe so, your Honor.

The Court: All right, come back, Captain.

(The witness returned to the witness
268 chair.)

By Mr. Parmer:

Q. At the time that you were talking to him, was he awake or asleep? A. No, he was awake. He was—I didn't see—he was holding his hand to the head, somewhere, but he was all right otherwise.

Q. And how long thereafter did he remain on the ship, this injured man? A. Well, I can't say exactly that because after inspecting him and look-
269 ing him over, I told him, the mates, to watch everything. I ran right away to the shore and called my office and informed. I don't know. He was on board ship.

Q. Did you make any inspection of the ship? A. Well, after I came from phone, first thing I looked over ship's gear, shackles, wires, and everything; and everything was in very good order; was nothing broke from ship's gear.

Q. Did you examine the broken boom? A. Oh, yes.

Q. What did you observe with respect to the
270 parts of the broken boom? A. Well, I found the wood, all wood in very good condition, in perfect condition.

Q. What did you find with respect to the gooseneck? A. The gooseneck was bent.

Q. I show you this picture, Captain, which has not been marked yet. Does that show the gooseneck in the lower portion and the broken boom as it was after the accident? A. Yes.

Mr. Parmer: I ask to have this marked, please.

Mr. Fisch: No objection.

271

(Received in evidence and marked Defendant's Exhibit F.)

By Mr. Parmer:

Q. Now, Captain Bols, I want you to look at this Exhibit F and point out the portion of this gooseneck which is metal and the portion that is wood. Just point it out and we will mark it later. A. Well, metal goes from here, this (indicating). This part, this part here in front, this part is wood.

Q. Here at the upper portion of the picture, 272 show me where the metal is and where the wood is. A. This is border between wood and metal.

Q. That is the border? A. Yes.

Q. That is sort of a half moon? A. Yes, and this is all metal here.

Q. Now, let us draw something which shows the —I will draw one arrow pointing to the metal portion and put the word "metal" on that arrow; and another arrow pointing to the wood portion with the word "wood" alongside that arrow. Now I will draw another line along the dividing line between the wood and the iron.

273

Mr. Fisch: Draw a line between both.

Mr. Parmer: If I do that, it will obliterate what the picture shows, which I do not want to do.

By Mr. Parmer:

Q. This ring portion here, this ring showing around the wood, is that metal too? A. That is metal.

Mr. Parmer: We will put an arrow to
274 that and put the word "metal."

Q. And the ring at the bottom, that is metal? A. Also metal.

Mr. Parmer: I will put an arrow to that, the word "metal."

Q. Now, did this gooseneck have any arms coming down the outside? A. On both sides.

Q. Can you see any parts of those things in the photograph? A. No, I do not see any; possibly it
275 is by the end there.

Q. What is on there? A. That is wood.

Q. That is wood? In other words, there are strips of metal coming down the sides— A. Yes, sir.

Q. —as I draw there? A. Yes, on both sides.

Q. On both sides.

Mr. Parmer: And I will put "metal" along those lines, denoting where that metal is.

Q. And this portion here that I am pointing to
276 now is the wood? A. It's wood.

Q. Very good. We will put "wood" there.

(Defendant's Exhibit F shown to the jury by Mr. Parmer.)

Mr. Fisch: Your Honor, may we suspend? It seems that both doctors are here now. They want to get away as soon as possible.

The Court: I want to oblige the doctors. Have you much more with this witness? 277

Mr. Parmer: I don't have much more, except that it is a long process, you know, explaining this.

The Court: Well then, we will withdraw him and let Mr. Fisch finish his case. You may step down, Captain.

(Witness temporarily excused.)

Testimony of Drs. Patella and Leiner omitted. 278

The Court: The plaintiff rests?

Mr. Fisch: Yes, the plaintiff rests.

Mr. Parmer: Your Honor, I want to make a motion. I do not know whether I should make it in front of the jury.

The Court: Make it in the presence of the jury. State your grounds.

Mr. Parmer: I move to dismiss the complaint in this case on the ground that there has not been sufficient evidence of negligence or a cause of action proved against the defendant partnership known as Thor Eckert. 279

I move, first, on the ground that there has been no proof offered as to the orders and regulations issued by the United States pursuant to the provisions of the general agency contract which has been evidence and on which reliance is placed by the plaintiff in order to make out an alleged cause of action against this defendant. That contract, and particularly Section 14 thereof, on which I am told that reliance is placed

by the plaintiff, is predicated definitely on
280 orders, regulations, and so forth, being issued by the United States. It is the plaintiff's burden to prove that there was a violation of duty by this defendant. It was the plaintiff's burden to prove those duties, if the contract is relied on; to prove those duties; the regulations, and the orders must be proved as well.

I also move to dismiss the complaint on the ground that there has been no proof or evidence in this case that these defendants,
281 that is, the partnership, had anything to do at all with supplying or furnishing the equipment, to wit, the boom or any other equipment on board this ship, to the plaintiff or to the longshoring organization for which he worked as of the time of the accident.

I specifically submit to your Honor that the contract which has been put in evidence is not sufficient to prove that this defendant furnished this equipment to the plaintiff. There is no other evidence of negligence.

282 The Court: Suppose we excuse the jury.

We will excuse the jury till two o'clock. Do not discuss the case among yourselves nor permit anybody to discuss it with you, ladies and gentlemen. Be back in your seats at two o'clock. Do not visit the scene of the accident.

(Jury departed from the courtroom.)

Mr. Parmer: I just want to add to that ground, your Honor, that there is no proof

of any control or occupancy of the premises, that is, this ship, on the part of this defendant. 283

The Court: What have you to say on that, Mr. Fisch?

Mr. Fisch: Well, the letter which I have attached to the pleadings is an admission of the fact that they are the general agents. Is that correct, Mr. Parmer, that the defendant is?

The Court: You are referring to the letter of May 8, 1944, which states as follows: 284

"This will confirm conversation between you and our Mr. Parmer in which we said that the answer which had already been filed on behalf of the Gerda Eckert and Thor Eckert, Jr., was not intended to deny that the partnership of Thor Eckert & Company were general agents of the United States pursuant to a G. A. contract. Very truly yours, Kerlin, Campbell, Hickox, Keating & McGrann, by Mr. Parmer."

Mr. Fisch: With that being in the record, then, we say to your Honor that we have shown a condition where the wood constituting the boom was rotten, where pieces came out, or portions of it like sawdust; and under the decisions which we handed to your Honor, no notice of this condition is necessary, if it could have been discovered previously. The decisions that I submitted to your Honor have to do with ropes and chains and also wood, as in the Brady decision. That is all the evidence there was in the Brady decision, that somebody saw the stair- 285

way that the Customs Guard Brady walked
86 down on was rotten. It's exactly the same.

The Court: It is the case in which the Customs guard was killed. The ladder broke.

Mr. Fisch: The ladder broke, like here, the boom broke. There isn't much difference in that.

We contend, in view of all the decisions that we gave to your Honor, there are about ten Judges to one, and the Brady decision; and one more important thing, while we are speaking for record: This is a contract made
87 under a Federal regulation. It is made either under the Federal law as the United States Supreme Court has stated in the Brady decision or made pursuant to an order which the Administrator of Shipping had pursuant to that Federal law. At all events, it is a Federal question, and we contend to your Honor that, while we say that all the decisions of this State say that an agent who fails to repair is guilty of misfeasance, we yet say that it has no application to this question, because it's a Federal question. And we submit to your Honor
88 this proposition:

When a Federal question is involved, we then must go to the restatement of the law of agency as it exists throughout the United States, in the absence of Federal law, although in this case we have a Federal decision, which is the Brady case; but, in assuming we didn't have that Brady decision, then we have a restatement of the law of agency. We submitted to your Honor the restatement of law of agency in our brief,

and I will say the statements of one text writer, Mechem, who is considered quite 289
an authority as to what the law is in the United States, and we submit that at the present moment, there is surely evidence of negligence sufficient to submit to the jury, and at this time the motion to dismiss should be denied.

The Court: As I understand Mr. Parmer's motion, he is moving to dismiss the complaint on the merits. Before we get that far, I would like to ask you this: There is a question in my mind whether or not you 290
failed in the proof, not with reference to a dismissal on the merits, but with reference to whether or not you failed to make out a case by reason of a failure of proof, a failure of proof, and whether he is not entitled to a dismissal without prejudice by reason of the following circumstances—maybe you can convince me. You rely on Article 14 of the contract, do you not?

Mr. Fisch: Yes, sir.

The Court: All right. Now, that places on the general agent, as I read it, the duty of arranging for the repair of the vessels 291
as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. Now, this duty is imposed on the general agent subject to such regulations and instructions or method of supervision and inspection as may be required or prescribed by the United States.

Have you proven the regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States?

Mr. Fisch: It is not necessary, for this one reason—

The Court: Well, do you admit you haven't proved it?

Mr. Fisch: We admit that.

The Court: Now, you say it is not necessary to prove it?

Mr. Fisch: I will tell you why, your Honor.

The Court: All right.

Mr. Fisch: That is something for them. If they say that anything took place that varies the terms of this contract which is in evidence or modified the instructions, it is for them to prove, because we stand on this contract at the present time. In the case of Quinn, which was decided by the Circuit Court of Appeals in this Department, where the defendant came for work and showed that a certain amount of control was taken away from it by reason of these regulations, the Quinn decisions held that the defendant—

The Court: What case in your memorandum?

Mr. Fisch: This is on page 10 of a supplemental memorandum of law. That is where the Court spoke in the Quinn case at page 191.

"Even if the Maritime Commission selected the officers, as appellant contends, the appellant was not ousted of control. It was the appellant that came forward with these regulations and with the proof to show that they had nothing to do with hiring the crew and the officers, and yet the Circuit

Court of Appeals said, taking the whole contract, not only one portion of it, the defendant was not ousted of a measure of control." 295

Now, I think we ought to put this in:

"Common sense and the precedents make the applicant liable on the facts in this case. It had almost substantial measure of control over the operation of the vessel. It was paid to manage, operate, and direct the business of the line"—which is our contract here.—"The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of de facto control, and there is no showing that in fact the owner did substitute itself as manager either generally or at the time of this accident." 296

There is no showing. They have got to show that. The burden is upon me to show that they were ousted of control under that contract. The burden is upon them to show, if they say they have no control over the 20 articles. Let them show it, and then we come forward with other proof.

I think those two cases, the Quinn case especially, which was cited with approval in the Brady decision in the Supreme Court— 297

The Court: Have you got anything to say on that point, Mr. Parmer?

Mr. Parmer: Yes, I have, your Honor. I call your attention, your Honor, to the fact that in the Quinn case and the Brady case, there was a different contract from the contract which we have here. In that contract, the duty was placed upon the general agent

to man these ships. From that duty of manning the ships, which was specifically set forth in the contract, an inference of control of the ships was taken by the courts. When the inference of control was once taken, then it became the duty of the person in control to show that their control was restricted and limited by reason of subsequent orders, and so forth, from the United States. And that is the meaning of the C.C.A., and it is the decision in the Quinn case to which reference has just been made by Mr. Fisch.

In this contract, which was made after the Quinn case had been decided, and in view of war conditions, the control of the vessel was specifically given to the Master of the ship who is the employee of the United States. The duty of manning the ship was taken away. All that the general agent does under the present contract is to make available the crew, to procure them for the Master who employs them. Therefore the control of the ship here, on the face of the contract, is placed in the United States; and the contract, going on from that assumption, that the control is in the United States, places duties upon the agent, as in Paragraph 14th, and says all those duties are subject to the orders and the regulations of the United States, which is in control.

So this case is entirely different from the Quinn case. Here we do not have control and here we do not have the burden mentioned in the Quinn case of going forward to show that our control has been limited by

subsequent regulations. The burden is upon Mr. Fisch to show that notwithstanding 301
the evident control, the apparent control, which is spoken of in the contract as being on the United States, somehow or other, the agent got into the picture and took the control away from the United States or that was the United States' arrangement.

Mr. Fisch: I think we can clarify the situation, your Honor. I did not realize what the contract now says, Article 14.

The Court: Yes, sir.

Mr. Fisch: "The general agent shall, 302
unless otherwise instructed." Now, we had no proof here that they were otherwise instructed. There is no proof that they were instructed at all, so we must stick to this agreement. But, we go a little further:

"Subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States."—as may be. We do not know whether there was a single regulation here. We know nothing at the present moment, but we have this contract.

The Court: You could find that out, 303
couldn't you, in an examination before trial?

Mr. Fisch: We were not interested, for this reason: We went through so many of these cases, and I have a complete trial in my office of a case similar to this on all fours, with the exception, as I said, instead of the wood being bad, the metal chain was bad.

From the beginning to end, all we proved was the contract, and three Judges at three

different trials thought that was sufficient
304 under the law. If they had regulations, it was for them to prove those regulations. Now, I will submit that to your Honor.

There is one more phase, which is the bone of contention here, and we are going to stick to that until the United States Supreme Court decides that. I do not mind making the statement that the United States Government is trying to help out these operators who originally owned this ship. As soon as the Brady decision came down,
305 it became evident they might try to throw these litigants into Admiralty. If you read all the articles, your will find that they did not succeed.

I will tell you why. There was a difference between tweedle-dee and teedle-dum. In the first contract, the agent had a duty of employing the crew. In the second contract, he only supplied the crew, and the crew became employees of the United States Government. Now, mark you and see this distinction. But the entire contract as to Article 14 is similar to the original Article
306 14, which had to do with repairs. And as Judge Libell said when he dismissed in the Export Line a complaint, where the failure or the negligence was asserted to be the negligence of the crew, he said there is no question here about appliances being defective, realizing that in both contracts he was passing on a new contract, realizing that the appliances—that the duty of making repairs, was upon the agent.

Now, we go a step further. You will find

in some of these articles, some of these articles from 1 to 20, that they talk about 307
the agent being the custodian of these ships, the agent being the manager and managing and operating the lines or the business of this defendant. You cannot in one breath say one thing and in another breath something else; and they say, when this contract is terminated, the agent is supposed to turn over all the ships in his possession and in control, that he has, to the United States of America, which to me seems that there has been no change in the first contract 308
from the second contract.

I don't think they succeeded, even on the proposition of negligence of manpower. Now, I am not talking about negligence of appliances. Negligence of appliances—every case that I have tried has gone to the jury, and every case in the ten cases I have cited to your Honor, submitted to Judge Walter, Judge Levy, Judge Schreiber, Judge Goddard, Judge Clancy, Judge Kennedy—I ask your Honor to reserve decision until I can bring this record to you. You can read it at your leisure. 309

The Court: The only thing that troubles me, Mr. Fisch, is whether or not there is a failure of proof. Maybe nobody ever raised that question before. Did anybody ever raise it before?

Mr. Fisch: Not just that. It was raised, that I have not proven a cause of action on the contract, or any other cause of action.

The Court: I do not think the motion to dismiss the complaint on the merits is good.

but it is questionable in my mind as to
310 whether the motion to dismiss on the particular point I point out, without prejudice, by reason of failure of the proof, is good.

Mr. Fisch: Will your Honor reserve decision until I can give you this complete record and also maybe a case or two, that we have a right, if they say this contract has been changed, it's for them to prove the change? At the present moment, we rest on this contract.

The Court: All right. I will reserve de-
311 cision on the motion. You can produce anything you want at two o'clock.

Mr. Fisch: I will bring the record at two o'clock, your Honor.

The Court: All right.

(Luncheon recess declared.)

AFTERNOON SESSION

The Court: Ladies and gentlemen of the jury, we are going to adjourn this case until ten o'clock tomorrow morning. Do not
312 discuss the case among yourselves nor permit anybody to discuss it with you and do not visit the scene of the accident. Ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until Thursday, June 7, 1945, at 10 A.M.)

Thursday, June 7, 1945.

313

TRIAL RESUMED.

(Same appearances.)

Mr. Fisch: Your Honor, while waiting for some of the jurors, perhaps we can get through with some of the things we started last night, in the absence of the jury.

(Jury retired from the courtroom.) 314

Mr. Fisch: May it please the Court, in conjunction with what we discussed last night, I just want to call your Honor's attention that rules and regulations or orders which are issued in addition to the agreement which is before your Honor and in evidence can only have three effects: They will either add or subtract from the contract or they will repeat the terms in the contract, which would be meaningless, because if all they do is repeat and reiterate, it has no place. 315

Now, if they add or subtract, it is a modification of the contract, and we ask your Honor or we say to your Honor that in 2 Clarke of the New York law on contracts, page 1174, stated:

"The burden of establishing by satisfactory evidence the alleged modification of an existing contract is on the party alleging it."

316 Then we go to 17 Corpus Juris Secundum, Section 588, page 1229:

"The party asserting the modification of a contract has the burden of proof."

Now, in spite of the fact that we claim we know of no modifications of this contract, we know of no orders, nevertheless, so that there be no doubt on the subject at all and in conformity with your Honor's statement that perhaps an examination before trial should have been had, we ask your Honor to permit the plaintiff to re-

317 open his case only for one purpose of attempting to prove, if he can—it may be possible—to introduce in evidence all rules and regulations, if they exist, pertaining to this contract.

The Court: Motion granted to that extent.

(Jury returned to the courtroom.)

Mr. Fisch: Mr. Winsch, please.

(Plaintiff's case now reopened.)

318 ---

HAROLD WINSCH, residing at 7040 Colonial Road, Brooklyn, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Fisch:

Q. Mr. Winsch, what is your business, please? A. Steamship agent and operators and brokers.

Q. And are you employed at the present time and by whom? A. I am employed by Thor Eckert & Company. 319

Q. What is your position in that firm? A. Manager.

Q. Did you receive a subpoena yesterday that asked you to bring down all the rules and regulations and orders issued by the War Shipping Administration in relation to the contract which is marked GAA 44.42? A. I received a subpoena. I am not sure of the number of that contract, but I presume we agreed on the number of it.

320

Mr. Parmer: Have you got the subpoena with you?

Mr. Fisch: We will show you the contract.

Mr. Parmer: Let's see if you have the subpoena. That will speak for itself.

Mr. Fisch: I think we passed that.

Mr. Parmer: What is the question to the witness now?

Mr. Fisch: I want to show him the contract.

By Mr. Fisch: 321

Q. On the first part, it tells you, on top, the date, and so forth. A. The subpoena did include this form of contract.

Q. Yes? A. Yes.

Q. Had you received any rules and regulations, written papers, from the War Shipping Administration, concerning the contract that Thor Eckert had in relation to the operation of S. S. Everagra? A. Yes, sir.

Q. Did you bring them down with you? A. Yes,
322 sir.

Q. Are these the things you brought down? A. Those are the ones I have been able to get together up until this morning. We had insufficient time to gather all of them.

Q. That is all right. That will be fine. And also this? A. Yes, sir.

Mr. Fisch: We offer them in evidence.

Mr. Parmer: No objection.

Mr. Fisch: Your Honor, may we consider these things, just all these packages
323 of data which the witness has stated he received in relation to the operation of that vessel? All I can do is offer it in evidence. It is up to the Reporter or perhaps ourselves to mark it in the best possible manner so that we know—

The Court: You advise the Court what you are offering in evidence.

Mr. Fisch: We offer all the rules and all the regulations that Mr. Parmer says we are obliged to offer.

The Court: I haven't heard Mr. Parmer say anything.

324 Mr. Fisch: In his motion to dismiss, he stated that.

The Court: Mark them.

(Rules and regulations received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Fisch: That is all.

The Court: You may step down.

(Witness excused.)

HARRIS LEVY, residing at 2137 Wallace Avenue, Bronx, New York City, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows: 325

Direct Examination by Mr. Fisch:

Q. Mr. Levy, you are employed in my office? A. I am.

Q. Did you give that subpoena duces tecum to someone in that office in charge of the records to read? A. I did.

Q. Did you give that subpoena tecum to someone in that office in charge of the records to read? A. I did. 326

Q. Who was it? A. Mr. Blasie.

Q. Did he accept the subpoena? A. He did not.

Q. Did he give you a reason why he refused to accept the subpoena? A. He did.

Q. What was the reason? A. He said that they were not subject to subpoena unless directed by the Washington office of that department.

Q. Did he, however, after reading the subpoena duces tecum, hand you some book? A. He did.

Q. Did he give you any information in relation to that book? A. He did. 327

Mr. Fisch: We offer from pages 326 to 336 in evidence.

Mr. Parmer: Your Honor, I had a conversation with Mr. Fisch before this was offered and I told him I would have no objection on the ground that it had not been proved properly, to the admission of the whole book for what it purports to be; and I have no objection to the offer of the whole book for what it purports to be now.

However, I do object to your reading from
328 certain selected portions of it.

Mr. Fisch: Then I will offer the whole book.

Mr. Parmer: In other words, it is a compilation of standard contract forms.

The Court: The objection is withdrawn then?

Mr. Parmer: That is.

(Book received in evidence and marked Plaintiff's Exhibit 7.)

329 Mr. Fisch: Your Honor, I am going to call a very important witness, Mr. Raymond Parmer.

RAYMOND PARMER, residing at 261 Highbrook Avenue, Pelham, N. Y., called as a witness in behalf of the plaintiff, being first duly sworn testified as follows:

The Court: On this Exhibit 7, what pages do you wish to call my attention to, Mr
330 Fisch?

Mr. Fisch: 326.

Direct Examination by Mr. Fisch:

Q. Mr. Parmer, you are the attorney who is trying this case— A. Yes.

Q. —for the defendants? A. Yes.

Q. And have you in the past week visited the office of the War Shipping Administration at 45 Broadway? A. Yes.

Q. And the purpose of your visit, was it not, to find if there were any rules and regulations pertaining to this War Shipping Administration agency contract? 331

The Court: Don't answer it. On my own motion, I will sustain the objection.

Mr. Fisch: We respectfully except.

The Court: Certainly.

By Mr. Fisch:

Q. Did you procure in that office any data in relation to rules and regulations that pertain to this agency agreement? 332

The Court: On my own motion, I will sustain the objection.

Mr. Fisch: We respectfully except. That is all.

The Court: You may step down.

(Witness excused.)

Mr. Fisch: That is the plaintiff's case, your Honor.

The Court: All right. Are you prepared to point out to me, Mr. Fisch, what you say is pertinent to your case in these hundreds or perhaps thousands of pages that you have offered in evidence under Plaintiff's Exhibit 6? 333

Mr. Fisch: Yes, I may, your Honor.

The Court: Very good.

Mr. Fisch: Here it is.

The Court: All right. I will reserve decision on the whole motion. Take an exception to my reservation of the decision.

Mr. Parmer: Yes.

334 The Court: I call your attention to this, Mr. Parmer.

Mr. Parmer: Yes. I am well aware of that, your Honor. Your Honor calls my attention to a maintenance and repair, regulation No. 1.

The Court: Which Mr. Fisch says is part of Exhibit 6. That is correct, Mr. Fisch?

Mr. Fisch: Yes.

Mr. Parmer: This is part of Exhibit 6, and is the only thing on which he relies, I take it.

335 Mr. Fisch: Yes.

The Court: The only portion of the exhibit on which you rely?

Mr. Fisch: That is right.

The Court: All right.

Mr. Parmer: I call your attention, your Honor, to the fact that obviously there are many other regulations, and I assert that there are other regulations which affect this vitally, many regulations which affect this vitally; and that no one can tell from just putting in evidence one of the manifold regulations of the W. S. A., just what the du-

336 ties of the agent were at the time in question.

With respect to this particular regulation, I have this to say: On the first page of it, it says that the maintenance and repair of all vessels owned by or under bare boat charter and operated for account of the United States, represented by the War Shipping Administration, are under the direction of the Executive Manager, Main-

tenance and Repair Division, who will exercise full authority and control over all ship repairs and maintenance, in which the War Shipping Administration may be concerned, and so forth. 337

That Paragraph 2, entitled "Repairs to be Ordered by General Agent," says this: In instances where vessels owned by or under bare boat charter to the United States and assigned to general agents under service agreements with the War Shipping Administration, require that repairs . . . involving the expenditures of not more that $10,000 in respect to any one voyage, the general agents shall arrange for and order the performance of such repairs without prior written approval of the local manager, maintenance and repair division. 338

The Court: I read that.

Mr. Parmer: Your Honor, that refers to a situation where it is known that a vessel requires repairs. Where it does require repairs, the general agent puts forward the contract. As a matter of fact, I have ascertained that in this voyage the repairs required were over $10,000, and the thing was handled by the W. S. A. I am just telling you. 339

The Court: That is a matter of proof, isn't it?

Mr. Parmer: It is a matter of proof, and I can prove it. It depends upon whose burden it might be; but it is so. I found that out. And that the general agent's duties, which follow in enumeration thereafter, are all subject to the foregoing paragraph. That

is where it is his position to contract for
340 the repairs. Then he has these duties—

Mr. Fisch: Your Honor thinks I ought to reply to that? I think I can.

The Court: No.

You had better mark that paper as Plaintiff's xhibit 8, and on the statement of counsel for the plaintiff, it is part of Exhibit 6, and the only portion of Exhibit 6 on which he relies.

(Paper received in evidence and marked
341 Plaintiff's Exhibit 8.)

HAROLD WINSCH, recalled as a witness in behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Winsch, on January 27, 1944, the day of this accident, who, if you know, was servicing the vessel Everagra as agent, either general agent or berth agent? A. Well, as general agent, we, Thor
342 Eckert & Company, acted in behalf of the War Shipping Administration, and as the berth agent, the War Shipping Administration assigned the vessel to Moore-McCormack, Incorporated, 5 Broadway, New York.

Q. Did your company have anything to do with the stevedoring of the vessel at this time? A. No, sir.

Q. Who handled that matter? A. Moore-McCormack as berth agent instructed and authorized to handle such matters.

Q. Are they agents of the War Shipping Administration too? A. Yes, sir. 343

Q. Was the vessel on January 27, 1944, at one of the piers owned or controlled by you? A. No, sir.

Q. Do you know what pier she was at? A. The vessel was at Pier 34 North River.

Q. Do you know who has that pier? A. Well, the vessel—the pier, as I recall it, is controlled by the Atlantic & Gulf and West Indies Steamship Company—

Q. Yes? A. —of New York.

Q. Do you know what relation Moore-McCormack had to it at that time? A. Well, as I understand it, Moore-McCormack made an arrangement with Atlantic. 344

Mr. Fisch: Just a moment, please. We must object.

Mr. Parmer: All right.

The Court: Sustained.

By Mr. Parmer:

Q. You have nothing to do with making those arrangements yourself? A. No, sir.

Mr. Parmer. That is all, Mr. Winsch. 345

Mr. Fisch: That is all.

The Court: You may step down, sir.

(Witness excused.)

Mr. Parmer: Captain Bols.

SERGEJS BOLS, resumed the stand, having been
346 previously duly sworn, testified further as follows:

Direct Examination (Continued):

By Mr. Parmer:

Q. Captain Bols, I think the last question I asked you when you were on the stand yesterday was with respect to the inspection you made thereafter. Do you recall making an inspection after the accident? A. Yes.

Q. And what did you find? A. Well, I found all
347 ship's gear and shackles, wires, everything in good order. Nothing was broken except the boom.

By the Court:

Q. Except what, Captain? A. Except the boom.
Q. The boom? Keep your voice up.

By Mr. Parmer:

Q. Where did you observe the boom? A. The boom was laying between winch and that bulkhead there.

348 Q. This after bulkhead? A. Yes, between them.

Q. Do these pictures, Exhibits C and B, show the position of the boom after the accident? A. Yes. Yes.

Q. And where were the wires and the various cables? A. They were laying all around the deck there, and later on guys and "preventers" were taken on the side. There is a place to walk.

Q. You put them to one side there so there would be a place to walk? A. Yes.

Q. How long did the boom remain in the position that you have described? A. It remained—the boom remained next day, the 27th, and pictures were taken, as I remember, on 28th; and then, after that, we took this boom off. I don't remember exactly dates, but it was at least two days. 349

Q. Was the condition of the broken appliances disturbed in any way from the time of the accident up until the time that the pictures were taken? A. Sure, it was [redacted] across thte passage there.

Q. Do you understand what I mean by "disturbed"? 350

Mr. Fisch: Changed.

Q. Changed? A. No. No. There was nothing changed.

Q. Kept in the same condition? A. In the same condition all the time.

Q. Do you remember Mr. Augenti coming on the vessel? A. Yes.

Q. When did he come on? A. He came in at least three-quarter hour or hour after the accident the first time.

Q. Did you say three-quarter hour to an hour after the accident? A. After the accident, yes. 351

Q. Now, Captain Bols, I want you to look at this: These two pieces of wood. Will you tell us whether that is part of the broken boom? A. Yes, that is part of the broken boom, because after pictures were taken, I ordered my carpenter to saw broken part of and deliver that to my office.

Q. You recognize this as the part that was sawn off? A. Yes.

Q. This sliver with the writing on it, was that sawn off by you or was that already broken off at the time? A. It was broken off.

Q. It was broken off? A. Yes.

352

Mr. Parmer: I offer these two in evidence.

Mr. Fisch: Ray, will you give me just a moment, please?

Mr. Fisch: Mr. Caldarola, will you come over here?

(Discussion off the record.)

Mr. Fisch: All right, we consent.

The Court: All right, it may be marked; no objection.

353

(Large piece of wood received in evidence and marked Defendant's Exhibit K-1, and small piece of wood received in evidence and marked Defendant's Exhibit K-2.)

By Mr. Palmer:

Q. Captain Bols, I show you this photograph, No. B, and call your attention to the end of the boom shown in the photograph. Does that show the place where this Exhibit K-2 had come off? A.

354 Yes, that is the place.

Q. You can see it there? A. Yes, but the end of the boom, it was bent, this angle here.

Q. Have you got— A. That is why this end is in such shape.

Q. Wait a minute. We will mark something here. You mentioned a certain angle. Right? Now, are you pointing to the angle now? A. That is the angle.

Q. We have an arrow pointing to this, with the

word "angle" written alongside it. What do you say happened to that angle? A. It was bent by the force. When the boom came this way, it bent this angle. 355

Q. I see Is this the place where the sliver, K-2, came off? A. That is the place, yes.

Q. I will have an arrow pointing to that, with the word "silver" on it. You say that when it bent the angle, it caused these marks to be on it? A. That is right.

Q. That is on the end of the broken parts, is that what you mean? A. That is right, yes.

Mr. Parmer: Your Honor, I'd like the jury to inspect the wood. 356

(Defendant's Exhibit B and K-1 and K-2 were shown to the jury.)

Mr. Parmer: The jurors may feel it, if they wish to.

The Court: Yes, of course. Any juror in the second row that would like to do so may step down. There is no obligation on you to do so, but if you wish, you may.

(Jury inspected the exhibits.) 357

By Mr. Parmer:

Q. Now, Captain, I call your attention to this place right there. Notice the angle? A. Yes.

Q. Can you tell us what that represents? A. That is because two iron—from here was gooseneck.

Q. Yes? A. Two pieces of iron goes for about three feet, and they are clamped with these straps here, two places. That iron was here. One iron

was on this side. That is the end of the iron here.

358 Q. I see. A. On both sides.

Q. That is the iron on both sides? A. Yes.

Q. Ended in these angles? A. Yes. Ended in these angles. It was two iron straps around there. You can see that from the pictures too.

Q. And this discoloration here is due to what? A. Due to iron.

Q. Iron? A. Iron rust, rust.

Q. Have you a knife with you? Will you cut out a piece from this place here so we can see the condition of it.

359 Mr. Fisch: I don't think—your Honor, we would object to this exhibit being touched in any way at all.

The Court: Overruled.

Mr. Fisch: We respectfully except.

By Mr. Parmer:

Q. Will you cut out a piece from this place where the iron was so that we can see its condition underneath (referring to Exhibit K-1)? A. It is impossible to cut.

Q. Well, do your best. Work at it, please. A.

360 I can't cut that.

Q. Stand up, Captain. You are sitting down, Captain, and you haven't got your leverage with you. A. Sorry. I can't do it.

Q. Can't do it with a k[illegible]. Have you got a better knife in your pocket? If not, we will send for a saw.

The Court: Send for a saw. I wouldn't bother, if I were you. I'd send for a saw.

Mr. Fisch: You are liable to hurt yourself. Send for a saw. 361

The Court: Let the record show that the Captain and counsel were unable to cut a piece from the portion of K-1, where the Captain identified the angle to be the place where the gooseneck rested. It that right?

Mr. Parmer: Yes, the angle of the strap and the gooseneck rested.

The Court: The strap and the gooseneck.

By Mr. Parmer:

Q. Captain, had you been present at any time previous to the accident when this boom had been inspected or tested? A. Yes. 362

Q. And when was that? A. It was in Boston at the end of December or beginning of January, 1942 or 1943, in January. Lloyds tested all the booms on board ship before giving a certificate to the ship.

Q. Were you present during the— A. Yes. I was present.

Q. Did you see it tested? A. Yes.

Q. And what weight was the boom tested for? A. It's about two and three-quarter tons. 363

Q. Two and three-quarter tons? A. Yes.

By the Court:

Q. Tell the jury how the test was made. A. The test was made by—I mean, using ship's winch and special—special scale where it's shown, and the derrick is, I would say, 45 degrees, and with the ship's winch, you—the scale is near the deck. It shows pound. And one end is fast at the deck

somewhere and the other end with a hook and
364 wire, which goes through the blocks, all blocks and on winch, and then usually ship's officer is standing.

Q. Not "usually." What did you see upon this occasion? A. On this case, this derrick was tested in about 3500 pounds.

By Mr. Parmer:

Q. Did you see it done? A. Yes. Well, it's usual—

Q. Was that method that you just described
365 used? A. Yes, from my experience.

Q. Never mind your experience. We want to know what happpened, what you saw happen. A. Yes; I saw it.

Q. Did you get a certificate at that time? A. Yes.

Q. Have you got it with you? A. I have certificate with me.

Q. I want to know the date, the exact date. Will you get the certificate, because I want to know the exact date when this thing happened. Where is it?

(Discussion off the record.)

366

Q. January 12, 1943? A. Yes, that's it. This certificate was issued.

Q. How did this certificate happen to be issued and this survey to be made? Was it just for booms or other things? A. No, the survey was made for all ship: Machinery, hold, and block pegs, and everything.

Q. How often does that survey on board your ship and other ships take place? A. On all ships, it takes place every four years.

A Juror: How long?
Mr. Parmer: Every four years. 367

Q. And this was the fourth year inspection? A. That's right.

The Court: What date is that?
Mr. Parmer: January 12, 1943.

Q. Just about a year before this accident, right? A. That is right.

Q. And this is the certificate you received from Lloyds at the time? A. That is right. 368

Mr. Parmer: I offer it in evidence.
Mr. Fisch: No objection.

(Certificate received in evidence and marked Defendant's Exhibit L.)

(Defendant's Exhibit L was shown to the jury by Mr. Parmer.)

By Mr. Parmer:

Q. I just want to bring out one fact while the jury are looking at that. Are you acquainted with the weight of the cargo which was being loaded from the ship at the time this accident happened? 369
A. I didn't hear you.

Q. Can you tell us the weight of the bags of cargo which were being unloaded from your ship at the time this accident happened? A. It was nine bags castor seed.

Q. How much did each bag weigh, approximate-

ly? A. I really don't remember exactly weight.
370 It's around 100 pounds.

Q. Around 100 pounds? A. Each bag.

Q. Previous to this accident, what sort of cargo was being taken out from that hatch? A. There was—on tween deck, there was rum.

Q. What? A. Rum.

Q. Is that rum? A. Rum.

Q. Rum in what? A. In barrels, big barrels. Also there was.

Q. When you say "tween deck," you mean from this hatch? A. Yes, that is on top of this hatch.
371 It was around 150 tons of general cargo on tween deck before we start to discharge castor seed.

Q. Was this equipment and this particular boom used for that? A. Same thing is used.

Q. How much did the drafts of those drum barrels weigh? A. I don't remember that, but I remember there was besides that, there was ore.

Q. What? A. Ore.

Q. You mean ore? A. Ore in little bags, 50 pounds; little, small bags, some special kind of ore from Brazil.

Q. Yes? A. But I don't remember how many bags they discharged at once.

372 Q. Who looks after, who knows about the weights of the cargo drafts? Do you have any officers who know that? A. Well, they don't pay attention to that either.

Q. That is up to the stevedore? A. Stevedores. Mates check always that hoists that are taken out are not exceeded what the booms can hold, not exceed more than it is on Lloyd's certificate, mentioned one-half or two, three-ton booms.

Q. Does each boom have a rated capacity? A. Yes, and it's written on the side of the boom, capacity, how much it can lift safely.

Q. Do you know what was stated on the side of this boom? A. One and a half tons. 373

Mr. Fisch: I think I will remove this so that there will be no accident.

(Exhibit K-2 removed from the jury rail.)

Mr. Fisch: Your Honor, I prefer to wait until the jurors are finished with the exhibit.

The Court: All right. 374

By Mr. Parmer:

Q. Captain, I show you this Exhibit D. Can you tell us what happpened to the other portion of the broken boom, that is— A. This portion?

Q. That was attached to the mast, yes. A. Well, this, after this accident, the shipyard came to renew derrick. They took this portion off and took that to the top of the—I don't know what happened.

Q. Keep your voice up.

The Court: Captain, you will have to do better. I know that you talk louder on board ship. I don't know why you can't keep your voice up here. Let me have an answer, please. 375

A. Well, this portion was taken off and taken to shipyard, because they used the same gooseneck for new boom.

Q. You don't know what happened to the wood? A. No, I don't know what happened to the wood.

The Court: All right, Mr. Fisch.

Cross Examination by Mr. Fisch:

376

Q. Captain, if there is any question I ask you which you do not understand, will you tell me that, please? A. All right.

Q. The first question that was asked you by Mr. Parmer was, For whom are you working? You answered, for the United States. A. United States War Shipping Administration.

Q. You remember that answer, don't you? A. That's right.

Q. How do you know you are working for the United States of America?

377

Mr. Parmer: I object to that.

The Court: No, overruled.

A. Because the vessel is owned by War Shipping Administration.

Q. Somebody told you that? A. Well, I read in some regulations.

Q. Regulations? A. Every Master on board War Shipping Board is in employ of the United States Government.

Q. Before you came to court, you had a talk with somebody, did you not, about what you were going

378 to say in court? A. A talk? I saw this model in Mr. Parmer's office, but I didn't talk anything.

Q. No. You don't understand my question, Captain.

By the Court:

Q. He wants to know, did you talk with Mr. Parmer or anybody about the case before you came to court.

The Court: That is the information you seek to elicit, is it not? 379

Mr. Fisch: That is right.

A. Well, Mr. Parmer explained—

The Court: Just yes or no.

A. Yes.

The Court: Yes.

By Mr. Fisch:

380

Q. And was the subject for whom you were working—was that asked you? Did Mr. Parmer ask you that question? A. Yes.

Q. Now, as a matter of fact, you get paid, don't you, for being a captain? A. Yes.

Q. Who pays you? A. War Shipping Administration.

Q. You get that in cash? A. Well, I get that in cash through my agent, who is—through the ship's agent.

Q. What is the agent's name? A. In every place, I have different agent.

Q. I am talking about in New York here. A. 381
Thor Eckert & Company.

Q. You go to Thor Eckert & Company to get your pay, don't you? A. I go to Thor Eckert & Company and I inform them how much money I need. I paid myself. I received money for all crew on board ship from Thor Eckert & Company in this case in New York.

Q. Does Thor Eckert & Company pay you in cash or by check? A. I sign always check.

Q. What is the name on the check? A. What is
382 it, a name? It mentioned always "Master S. S.," cash, advance to Master, S. S. Everagra.

Q. But the check has some name. Somebody signs it. You cannot use the check unless it has got a signature or it has got some printed matter on the check. What is the name on the check? A. Thor Eckert.

Q. That's right. Now, you told us also that after this accident happened—when I say you told us, I mean you told us that yesterday, so I can bring it back to your memory or mind, you said
383 that after the accident happened, you went ashore and you called and you said, "I called my office." You called Thor Eckert & Company, didn't you? A. That's right.

Q. Now, how long have you been captain of that ship? A. Since War Shipping took over, May 28, 1943.

Q. You didn't operate this ship before? A. No.

Q. Do you know the nationality of the vessel?

The Court: The registry? You mean the registry?

Mr. Fisch: Yes.

384 A. I was Chief Mate on the same boat that time, was Latvian boat.

The Court: No, the lawyer wants to know —Latvian?

The Witness: Latvian.

By Mr. Fisch:

Q. Would that be Riga? A. That's right.

Sergejs Bols—for Defendant—Cross.

Q. And for how long had you been Chief Mate on this vessel? A. That was since December 16, 1940. 385

Q. How long altogether was it that you worked on this vessel, whether mate, deckhand, or anything else, or captain? A. Nineteen years.

Q. You had the same boom on that vessel? A. That's right. However, I am on that vessel since 1940, December 1940.

Q. 1940? A. 1940.

Mr. Parmer: The 19 years refers to something else. 386

Q. When you said 19 years, what were you referring to? What do you mean? A. All my service at sea. You asked that.

Q. No, I did not mean that. How many years have you been on this vessel? A. Since December 16th, 1940.

Q. Now, do you know how many tons it is, this vessel? How many tons? A. Six thousand four hundred dead weight, 3,700 to Bruto register.

Q. When was it built? A. It was built in 1911, Glasgow.

387

The Court: Bruto, you mean gross.

Q. It was built you say in 1911? A. That is right.

Q. Would you consider it a new ship or an old ship? A. That is not new ship.

Q. Would you consider it an old ship? A. Certainly.

Q. Very old ship? A. Not very old.

Q. Not very old? Thirty-four old and it is not very old? A. No.

Q. How many trips had this vessel made to New
388 York before January 27, 1944, while you were on it?

By the Court:

Q. From 1940 to 1944, how many times did the ship come to New York? That is what the lawyer wants to know. A. I don't remember that.

By Mr. Fisch:

Q. Would you make a trip once a year, twice a
389 year, three times a year? A. Oh, well, we usually —those trips took around three months, from Brazil to New York, but how many trips we made altogether, I don't remember.

Q. And each time you got into the port, you would report to Thor Eckert & Company, would you not? A. I report to Thor Eckert & Company, absolutely.

Q. How would you report, in writing or by word of mouth? A. Well, I go personally always.

Q. You go personally? A. That's right.

Q. What would you report to Thor Eckert & Company? A. That the ship arrived in port.

390 Q. What else would you tell them? Just that? A. Well, I explained how the weather was and how the trip all went, what the conditions were, and so on.

Q. Did Thor Eckert & Company go on this ship at all, Everagra? A. Very seldom.

Q. When you say, "Very seldom," let us take just a year before this man was hurt. You remember that, don't you? A. I don't get you.

Q. A year, the accident happened January 27,

1944. That is about 16 months ago. A. That is right. 391

Q. Let us take the date of the accident and go back for a year. That would be January, 1943. Now, you think you made about four trips between January, 1943, and January, 1944, is that correct? A. Well, I don't remember where I made those trips, how many trips.

Q. I didn't say where. You think you made about four trips? A. I don't know really.

Q. You don't know whether— A. I don't remember so far away.

Q. You don't know whether you made three trips 392
that year? A. I don't know.

Q. —Whether you made one trip to New York that year? A. I don't remember that.

Q. Or whether you made no trips that year? A. Certainly, ship was sailing all the time, but where it was sailing, I have to look in my books.

Q. I didn't say where. I only asked you how many times during the year between January 1943 and '44 did you touch New York, did you touch the Port of New York. A. I don't remember.

Q. But at all events, every time she did dock into New York, you went and reported to Thor Eckert & Company? A. Every time when she 393
docked? Yes.

Q. Do you know of your own knowledge whether on a single occasion anybody from Thor Eckert & Company went on the ship during that year? A. Yes.

Q. When was that? A. I don't remember. I don't remember the dates.

Q. Do you know the person that went on the ship? A. Usually Mr. Olsen.

Q. Mr. Olsen? A. That's right.

Q. Who is Mr. Olsen? A. He is man employed
394 by Thor Eckert in the office.

Q. What is his position in that company, if you know? A. I don't know that.

Q. What did he do? What did you see him do on the ship? A. Once in a while he brought over mail on board the ship, usually on arrival.

Q. He brought mail? A. Yes, mail.

Q. What else did you see him do? A. Well, I explained him how the voyage was, what I need, how much money I need. I report to him.

Q. You explained to him how the voyage was, which means whether you had a rough journey or
395 a smooth journey? A. Yes.

Q. And how much money you need for your crew? A. That's right.

Q. He would give you the money for your crew? A. No.

Q. He would get money for you? A. No. Next day I go to office. I sign a check and get the money.

Q. Thor Eckert would give you money for yourself and the crew, is that right? A. For everybody.

Q. Everybody? A. For all ship's expenses.

Q. And when you say "the ship's expenses," that
396 includes the food? A. No, not food.

Q. What expenses do you mean then? A. Wages, overtime, bonus, my own expenses.

Q. That is really the wages of the men, isn't that so? A. Usually on board a ship all expenses for food, repairs, are paid by the office, by the agent.

Q. How do you know the repairs on this ship were paid for by the agent Thor Eckert & Company? How do you know that? A. Well, since the war, when I am sailing for War Shipping Ad-

ministration, I don't know anything, by whom—who pays them, because I don't sign any bills, anything. I just hand my requisition. 397

Q. Captain, you notice that the end which I show you of this boom is the part that was sawed off. Is that correct? A. That is right.

Q. You notice there are no pieces of wood missing; is that correct? A. Where, missing?

Q. It's smooth right here, is it not? A. That's right.

The Court: Except for that crack.

Q. Yes, except for the crack. A. That's no piece of wood. It's not missing there. 398

Q. Nothing is missing here? A. No.

Q. And you will notice, as I turn this around, that there are holes all over, pieces of wood missing, don't you? You notice that? A. Well, that broken part. The other end. I told you before that it was smashed against the angle there.

Q. Did you bring—did you have the other piece that was broken off right here? A. No.

Q. It was there on the ship, wasn't it? A. Well, certainly it was, other pieces. It was connected here.

Q. But you didn't bring the piece? 399

Mr. Parmer: Referring to exhibit, Defendant's Exhibit C.

Q. You did not bring the piece that belonged here, the other part of the broken boom? A. No, I did not. No.

Q. Now, were you there when this boom was sawed off? You used a saw for this, didn't you? A. That's right.

Q. You were there, weren't you? A. I was there.

400 Q. And you were there when the other piece that broke off was lying on the deck? A. That was not lying on deck. That was here.

Mr. Parmer: Pointing to Defendant's Exhibit C.

A. (continuing) That other broken piece.

Mr. Parmer: And pointing to the place on the mast where the thing is hanging.

401 Q. You could have taken a saw; as you sawed the piece off, you could have sawed the other piece off? A. No, I couldn't, because goosenecks, those iron —I mean on both ends, these iron parts. I can't saw the iron off.

Q. No. I did not ask you— A. Well, it's impossible to saw that.

Q. How long are the irons? A. You can see that.

Q. No, I am asking you. A. This is iron.

Q. How long? A. Well, it's about two or three feet. I don't remember.

Q. Two or three feet, but you could saw beyond
402 the iron, couldn't you? After the iron, when passed the iron, you could take that piece off? A. No, it was broken right by the iron. You can see here. This is—it was broken inside the iron.

Q. This part is wood, is it not? A. That is wood.

Mr. Fisch: Referring to Defendant's Exhibit D. Your Honor, may I impose upon the witness to step down for a minute?

The Court: Certainly.

403

(The witness left the witness chair and stood before the jury.)

By Mr. Fisch:

Q. You just stay this way and face the jury so that you can see what I am doing. Here is this other part that I am pointing to that was broken. That is not in court. Is that correct? A. That is right.

Q. This is iron, is that right? A. Yes, sir.

404

Q. This is wood? A. That's right.

Q. This is iron? A. Yes.

Q. You could have cut the wood right here, couldn't you? A. Excuse me. This is iron too.

Mr. Parmer: May those be marked?

Mr. Fisch: It is marked.

Mr. Parmer: The exhibit is marked. The part that the witness is pointing to, may those be marked so that we know what he is talking about?

Mr. Fisch: I will have him mark it. Just let me finish my question.

405

By Mr. Fisch:

Q. Captain, the iron that you point to at the sides, we see the irons right here, do we not? A. Yes, that is the end, but you can see—

Q. On both ends? A. That's the end. It goes right here.

Q. Yes? A. That is the end on one side and the end on the other side.

Q. And how many feet in length are those irons?
406 A. About three feet.

Q. Three feet? And they are attached to the wood by screws, are they? A. No, they are attached by these straps here.

Q. And these straps can be taken off, can they not? A. Well, it's a bolt holding these straps.

Q. I say the straps can be taken off? A. Certainly, can be.

Mr. Fisch: Mark the iron with the letter "I," or you mark it, Ray. That will be better.
407

(Exhibits marked.)

Mr. Fisch: Where the irons are, it is marked with the letter "I."

Go back, Captain.

(Captain Bols resumed the witness chair.)
chair.)

Mr. Parmer: You mean, Mr. Fisch, where the ends of the iron are marked with the letter "I."
408

Mr. Fisch: That is right.

Mr. Parmer: Because you realize the witness testified that these irons extend the entire length of this piece.

Mr. Fisch: He said about three feet.

By Mr. Fisch:

Q. Now, Captain, you notice that there is a groove here? A. Yes.

Q. And it is brown in color? A. Yes.

Q. That is where the pin— A. That is a bolt goes through. 409

Q. Bolt or pin? A. Yes, iron bolt.

The Court: Indicating the rough end of Exhibit K-1.

Q. And this was right through the boom, was it not? A. Well, it's right from one strap to another strap, holding them together.

Q. And looking at that strap, you could tell, could you not, that there was a pin through this wood? A. Yes. 410

Q. So anybody who made an inspection of this boom and saw where the irons were at the edge, they could see that there was a pin, still see the pin or bolt, as you say, right through the center of the boom, is that correct? A. That is right.

Q. Do you know anything about ship building, Captain? A. Well, I am not an engineer, I am a captain.

Q. I know. You only take care of the vessel for navigation, is that correct? A. For everything.

Q. You don't know whether this boom or—I will withdraw that. 411

Q. You don't know whether it was necessary to put that pin through the middle of this boom, do you? A. Absolutely necessary.

Q. You know that? A. Yes.

Q. Have you seen booms without pins, similar booms? A. Well, I never have such—never saw such accident. I never meet that.

Q. That is not the question that I asked you. You said a moment ago it is necessary to have pin—

By the Court:

412 Q. The lawyer wants to know, have you seen other booms with a gooseneck around them and a pin through them? A. Yes. Every wooden boom, every boom, have these same things.

By Mr. Fisch:

Q. You have seen that? A. Yes.

Q. Now, when this boom was tested, you did not personally make the test, did you? A. Well, I was present.

413 Q. I know, but you didn't make the test, did you? A. I was present together with Lloyd's surveyor, and we—I was not at the winch, but I was looking on a sketch.

Q. You were looking? A. Yes.

Q. You were not doing the actual testing, were you? A. Well, that is what it is, actual testing.

Q. Do you know of your own knowledge that when you put a pin through a boom in this fashion, that the strength of that boom is cut in half?

Mr. Parmer: Your Honor, I object to this. The claim here is not that there was any
414 original wrong construction of a boom. It is that the boom was rotten, and so forth.

The Court: Overruled.

By the Court:

Q. Do you know that as a fact? Yes or no? A. No.

By Mr. Fisch:

415

Q. Now, Captain, you told us that after the accident you saw this man Caldarola walking with two other men. Was he walking alone or did they hold him up? A. No. I told on each side he has man, that are holding him up.

Q. And how far did they walk with him? A. To the No. 2 hatch, bunker hatch.

Q. How many feet in your opinion would that be? A. I'd say it's about ten feet or twelve feet. I don't remember.

Q. And then he sat down, is that correct? A. 416
Yes. I asked those men to sit down that man over there, and I inspected him.

Q. And then you came over, you talked to him? A. Yes.

Q. Did he talk to you? A. Well, I don't remember. He was holding his hand to the head. I remember that.

Q. You don't remember whether he said one word to you, do you? A. Well, I don't remember exactly.

Mr. Fisch: That is all.

417

Redirect Examination by Mr. Parmer:

Q. Captain, were you dressed in uniform at the time that you saw Mr. Caldarola? A. No.

Q. Now, Captain, when you are in other ports than New York, from whom do you get money? A. My agent.

Q. Is that Thor Eckert & Company or are other persons— A. Other persons. Never from Thor Eckert & Company.

Q. Those are agents of the War Shipping Ad-
418 ministration as well? A. Yes.

Q. And Thor Eckert & Company merely gives you your money in New York? A. That's right.

Q. Was this boom which broke at the time of the accident on the vessel at the same place on the vessel at the time that the War Shipping Administration took over the vessel? A. Same boom, yes.

Q. Captain, you mentioned that when you came into port, you came with requisitions. What kind of requisitions did you come with? A. Stores, provisions, repairs.

419 Q. Who prepares those requisitions? A. Chief Engineer prepares engine repairs; Chief Officer, deck repairs; and I also prepare requisition for stores; and Chief Steward prepares a requisition for provisions for next voyage.

Q. And what do you do with those requisitions? A. I usually take them over to agents and give them to the agents.

Q. And on those requisitions do you state everything you need in connection with supplies, equipment, and repairs? A. Yes.

Mr. Parmer: Your Honor, we have a
420 saw.

The Court: All right.

Q. Captain, would you be good enough to saw at the place where you tried to cut with a knife? A. This place? Which way you want it?

Q. I want you to saw the length of this angle here. I will tell you what you do, Captain. Take out a piece just the size, cut right along here and cut right along here, and lift out the piece, if you can.

(The witness saws on Exhibit K-1.)

421

Q. Captain, I am going to recommend you come around here and saw this way so then you will get your saw in that. A. You need a chisel and a hammer.

Q. All right, if you want to go through, go right on, because we can put it in afterwards.

(Sawing of the exhibit continued by the witness.)

Q. Now, can you do the other side?

422

(Witness continued sawing.)

Q. You need a chisel and a hammer, do you? A. Yes.

Mr. Fisch: I will bring you a screwdriver after two o'clock, and a hammer too.

Mr. Parmer: The jury might wish to smell it freshly cut.

(Exhibit handed to jury.)

By Mr. Parmer:

423

Q. Captain, during the course of the voyages which your ship makes, is your crew engaged in doing various work on the ship in the nature of upkeep of the vessel? A. I don't understand it.

Q. I say, during the voyages which your crew makes from New York outward and back, and so forth— A. Yes?

Q. —does your crew have to do any work in the

nature of maintenance and upkeep of the vessel?
424 A. Certainly.

Q. What kind of work does the crew do? A. Engine department crew, they do the work in the engine room; and on deck, the deckhands, they usually paint and scale, and do every kind of work, splice—

Q. Is the painting of booms part of the crew's work? A. That's right.

Q. Before this ship went into the war service with the War Shipping Administration, what was the covering on the outside of these booms at that
425 time? A. On these booms, never were painted. Every year they were scraped and varnished. Varnished.

Q. That is varnished, you say? A. Varnished, like on the sailing ships.

Q. And then when she went into war service— A. Paint everything gray.

Q. I call your attention to this Exhibit K-2, and ask you what this discoloration is here that I am—. A. This is varnish.

Q. Varnish? A. Yes.

Q. Varnish leaking in from the outside, is that the idea? A. Well, it's a little holes or anything
426 in wood, varnish would go in and prevent from water.

Q. What is this discoloration here? A. This is rust from that pin—not from pin but from the iron which is—this is just how you—from gooseneck, those two strips that go over here; and that is at the end of that. It's little rust from that iron.

Q. That is from that iron strip that goes down the length of the gooseneck? A. Yes.

(Exhibit K-2 shown to the jury.)

Q. Tell me, Captain, can you tell us whether this little piece in here is iron or wood? A. No, that is rust, iron. 427

Q. Iron rust? A. Yes. That is rust here. That is all rust.

Q. Rust? A. Yes.

Q. Let's break it off and see. Rust mixed in with wood? A. No. That is rust, goes so far until this plate, and this is wood.

Q. Rust on top of wood? I see.

Mr. Parmer: That is all.

Mr. Fisch: That is all. 428

The Court: You may step down, Captain.

(Witness excused.)

The Court: Call your next witness.

Mr. Parmer: Mr. Peterson, please.

HARRY A. PETERSON, residing at 9426-55th Avenue, Elmhurst, Long Island, N. Y., called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer: 429

Q. Mr. Peterson, what is your business? A. I am an assistant local manager, maintenance and repair, War Shipping Administration.

Q. You will have to keep your voice up.

By the Court:

Q. Assistant local manager, again? A. Assistant local manager, maintenance and repair division, War Shipping Administration.

By Mr. Parmer:

430 Q. And where is your office? A. 45 Broadway, New York City.

Q. What do you do in connection with that business? A. Well, ships are operated under charters and boats are requisitioned from the private owners by the Government. We survey the boats and we record the actual condition so far as eyes can see the ship, and in addition to that, I have charge of damage repairs and maintenance and repairs throughout the vessel.

431 Q. Throughout all War Shipping Administration vessels? A. That is, what touches this Port of New York.

Q. Have you brought with you the contracts for the repair of the Everagra and the data with respect to the repairs on the Everagra as of January, 1944? A. Yes, I have.

Q. Will you produce them? A. It's by Todd Shipyard Corporation.

Q. Now, referring to these records, will you tell us when the repairs were begun on the vessel in January of 1944? A. This was on Contract WSA-4792, Supplement 346. That is a Navy defense

432 item started January 26, 1944, completed February 27, 1944.

Q. Now, what about the repairs which were in addition to the Navy defense item? A. Well, the above is that included in that contract.

Q. Yes. A. It's all the same broken down into two parts.

Q. I want to know when the repairs, the general repairs on the ship, were begun. As of what date? A. January 26, 1944.

Q. Are the specifications dated as of that date? A. There is one set here dated January 29, 1944, another February 5, 1944, February 9, 1944. 433

Mr. Fisch: Just a minute. I was wondering, your Honor, whether repairs subsequent to this date—

Mr. Parmer: I am not trying to prove repairs subsequent to the date. I am trying to prove them before the date, that is, I am trying to prove that they were begun on January 26th. That is what I am trying to prove. 434

A. (continuing) February 21, 1944.

Q. Let me call your attention to something. I call your attention to this invoice dated February 10, 1944. When does it say that repairs were started? A. Date started, January 26, 1944, to February 10, 1944, inclusive.

Q. That is, you mean the repairs which were the subject of the contract at that time were going on from January 26, 1944 until this date in February, 1944? Is that right? A. That is right. That is substantiated by the completion certificate signed by the chief officer, chief engineer, and a representative of the W. S. A. agent, and our marine surveyor. 435

Q. Now, when you say "our marine surveyor," you mean the War Shipping Administration? A. W. S. A., yes.

Q. How much did those repairs amount to in excess of defense repairs? A. They are broken down into groups.

Q. Yes? A. We have the old system of grouping, and that time was from 100, 101, up to 600.

That is for segregation of costs so we know where
436 to charge them to.

Q. We want to know how much the bill amounted to. A. The total bill amounted to, including defense items on this contract, $30,354.26.

Q. Now, exclude the defense item, and what did the repairs amount to? A. The repairs under Group 100, Items 1 to 29 inclusive, $29,942.70.

Q. Do you mean by that that those items were the repairs outside of the defense items? Right, sir.

Q. $29,000? A. Yes.

Q. Are you acquainted with the rules or the rules as they were at that time of the War Shipping
437 Administration with respect to the letting of contracts— A. Yes.

Q. —under 10,000 and over 10,000? A. Yes, sir.

Q. In which class did this come? Was this the War Shipping Administration's contract or the general agent's contract? A. W. S. A. It's over 10,000.

Q. It was your responsibility entirely, is that correct? A. That is, to inspect the work and award the contract.

By the Court:

438

Q. Who paid for it? A. W. S. A.

Q. War Shipping Administration? A. Yes, sir.

By Mr. Parmer:

Q. Now, what is the ordinary practice with respect to ascertaining of the repairs that have to be done to a War Shipping Administration vessel when it comes in from a voyage?

Harry A. Peterson—for Defendant—Direct.

Mr. Fisch: We object to that on the ground that the duties of the agent with respect to the repairs have been fully stated in the contract. 439

The Court: Overruled.

Mr. Fisch: We respectfully except.

The Witness. Shall I answer?

By Mr. Parmer:

Q. Yes, you may. A. Well, the agent, the general agent, that is, the agent for the War Shipping Administration, their port representative contacts our office and tells the ship is at a certain dock or it will be there; and we assign a man to the job. It may be the port captain, it may be the superintendent, engineer, or port engineer. However, he is connected with the shore staff. He has a list of work submitted by the chief officer, chief engineer, and the chief steward. They make up that list of repairs. Our job and the agent's job is to go aboard and see the necessity for those repairs. 440

We look at every item, and if the item requires repairs, we have the contractor right there with us—he is making the notes during the war condition, every five minutes—we never want to delay the sailing of the ship. 441

So, the supervisor of the yard, he may have the machinist foreman. He says, "All right, you get started here." As they go along, the machinist foreman is taking his notes.

After they went over the entire ship, they go up into the shipyard, up into the office; and with the supervisor of the yard, he prepares the specifications. They have covered every item submitted by the ship's personnel for repairs. And, then, from

there, as the work is going along, it is supervised
442 by the general agent; that is, he takes care of the job from then on, because with the completion certificate here, it has to be signed by him—the chief officer, sometimes the Captain and chief engineer, stating, "That this is certified to the best of my knowledge and belief, the above statement is in connection with the repairs enumerated in the specifications covered by the contract designated hereon, is true and correct."

Q. Now, you say that the practice is for you to take these requisitions from the ship's crew? A. Yes, sir.

443 Q. Has that always been the practice? A. Always, with the exception of the defense items that we put that in hand ourselves, because we have many communications with the Army and the Coast Guard. We have to do that work, but that is not repairs. That is repairs in this case to defense installations on the ship.

Q. Are you acquainted with the codification of the maintenance and repairs regulations which was issued revised as of December 15, 1944? A. May I look at it, please?

444 Mr. Fisch: What is the date of the revision?

Mr. Parmer: December 15, 1944.

A. I am.

Q. Are you acquainted with that? A. Yes, sir.

Q. Does that state the policy and the practices with respect to the duties of the general agent, as they have been from the beginning? A. Yes, sir.

Mr. Parmer: Your Honor, this is also among that stack.

The Court: Plaintiff's Exhibit 6?

Mr. Parmer: Yes, Plaintiff's Exhibit 6. 445

By Mr. Parmer:

Q. I call your attention to Part 3, former requirements, Section 3-1.

Mr. Fisch: We object to this item on this ground, because on the very paper which Mr. Parmer reads, it says, "Revised as of December 15, 1944, and effective January 15, 1945." It is effective now, had nothing at all to do with 1944, when the accident 446
happened. We contend it is immaterial, even if I offered it in evidence and tried to read some regulation made prior to the time of the accident. It would not be, in my opinion, admissible.

Mr. Parmer: Your Honor, I call attention to the fact that the witness has testified that this is a codification of the rules in existence from the beginning. It is a formal statement of what has grown up.

Mr. Fisch: That is an oral statement contradicting a written instrument which is in writing. The front page, your Honor, 447
the very front, it gives you the whole thing.

The Witness: Can I say something?

Mr. Parmer: You keep quiet.

The Court: Overruled. Mark it.

Mr. Fisch: We respectfully except.

(Received in evidence and marked Defendant's Exhibit M, entitled "War Shipping Administration. Maintenance and Repair Organization. New

York, N. Y., revised as of December
448 15, 1944, effective as of January 15, 1945.")

Mr. Parmer: It is formerly part of Plaintiff's Exhibit 6.

I want to read, your Honor, this clause here. Part 3, formal requirements, Section 3.1.

"Specifications for repairs. General agents shall obtain the vessel's requisitions for repairs from the deck, engine, and steward's departments, and in order to pre-
449 vent delay, shall, when conditions warrant, use these requisitions as preliminary specifications."

By Mr. Parmer:

Q. You state that has always been the practice, is that correct? A. Yes. Yes, sir.

The Court: May I see that exhibit of yours, Mr. Fisch, please?

How does that differ, Mr. Fisch, from Paragraph 3 of your Exhibit 8?

450 Mr. Fisch: Frankly, I haven't even read it. I just saw it. It says, "Revised and effective" as of a certain date, and not to clutter up the record, I just objected to it, because the record would be too big. That is the only reason. I cannot say there is any difference, because I haven't looked at it.

By Mr. Parmer:

451

Q. Now, can you tell us whether in connection with the requisitions for repairs submitted by the crew as of January, 1944, there was any requisition for a new boom or for repairs to an old one? A. I'd have to look through this thing here. I don't know. Is this a stevedore damage? I do not see any in here, any repairs to a boom in there.

Q. Any requests for a new boom? A. Well, I will tell you, I have to elaborate on this thing. If it is a stevedore damage—

Q. I do not mean after this accident happened. 452
I want to know whether there was any requisition for a new boom or repair to any boom on board the ship before this accident happened. A. Not that I can see in this here contract. Of course, you have got other contracts here going back to 1942.

Q. Do the contracts that you have as of January 1944, reflect the requisitions that were made at the time? A. No, sir.

Q. Do you understand what I mean by that? A. You want to know if there is a requisition in here for a new boom,—

Q. I want to know that first. A. —or repairs 453
to a boom?

Q. Yes. A. No, sir.

Q. Are the papers that you have in your hand there made up as a result of preparing requisitions and incorporating them into specifications for repairs? A. Yes, sir.

Q. Now, tell me, Mr. Peterson, if a boom is so rotten as to be powdery, the wood is powdery on the inside, is that a repair job or a renewal job?

Harry A. Peterson—for Defendant—Cross.

Mr. Fisch: We object to that on the
454 ground that this witness is not qualified to testify.

The Court: Overruled.

Mr. Fisch: Exception.

By Mr. Parmer:

Q. Is that a repair job or a renewal job? A. Will you repeat that again, please?

(Last question read by the Court Stenographer.)

455

A. Well, it would go on the records as a repair job, but actually it is a renewal, because we have to define the items for costs. That would come under the maintenance and repair, which would be Group No. 41, but it's actually a renewal—

Q. You have to give— A. —to a defective part. If the boom was powdery, that would be defective. Of course, that specification would read: "Remove and renew and replace as original."

Q. So you need new equipment entirely? A. It's a repair job.

Q. But you need new equipment? A. Absolute-
456 ly. You need a new boom.

Mr. Parmer: That is all.

The Court: Cross-examine.

Cross Examination by Mr. Fisch:

Q. Mr. Peterson, you are with the War Shipping Administration for how long a time? A. I came with them after the last war in 1921, and I remained with them until December 31, 1930. That

was the old Shipping Board. And then there wasn't any more work. So, I came back again in 1937, in July the 22nd, 1937. I have been with them since. 457

Q. What department are you in? A. The Maintenance and Repair.

Q. Now, you told us about usages and customs. You are acquainted with that, aren't you? A. Absolutely, yes.

Q. Are you also acquainted with the contracts that the War Shipping Administration has let, marked W. S. A., or I think it is GAA 44-42? A. That is not a maintenance repair. That is a charter party agreement. That is a service agreement between the WSA and the agent. 458

Q. All right. You distinguish that from something else, is that correct? A. Well, you are asking me about, was it a repair, speaking of WSA contracts. What contract do you mean? Repair contract or a service agreement contract?

Q. I refer to the service agreement contract. Are you acquainted with that? A. Part of it.

Q. Part of it? A. Well, I couldn't digest a dozen pages. I know when I see it, I work with it right along.

Q. Did you ever read the contract? A. Oh, yes. 459

Q. Are you acquainted with the terms of the contract? A. Yes.

Q. You told us about usages. You say when the vessel comes in, the port captain and the shore staff of the agent go on the boat, is that it?

By the Court:

Q. Somebody from the shore staff? A. Absolutely, because—

Q. Isn't that what you said, somebody from the
460 shore staff? A. Well, it's either the superintendent, engineer, or the port engineer, or the marine superintendent, or one of the port captains,—somebody.

By Mr. Fisch:

Q. Of the agent? A. Yes, of the agent.

Q. Of the agent? A. Right.

Q. So that let us assume for the sake of the argument that the vessel comes into the Agwi Lines. Are you acquainted with the Agwi Line?
461 A. Yes.

Q. The port captain of the Agwi Line and one or more men boards the vessel. Is that correct? A. Well, I don't know when they board it. They are on board the vessel when our marine surveyor is there.

Q. I mean with your surveyor.

By the Court:—

Q. Let me ask you a question. When you are talking about a port captain or port engineer, are you talking about the WSA port captain or en-
462 gineer or the general agent? A. The general agents.

By Mr. Fisch:

Q. When you told the Court and the jury before what the custom was about the port captain and the shore staff meeting your engineers, is that what you said? A. That is right.

Q. You meant the port captain and the shore staff of the general agent, didn't you? A. Right.

Harry A. Peterson—for Defendant—Cross.

And they also meet the mate, the captain, and the steward, because they have to go over the repairs. 463
They have to be aboard the ship.

Q. The agent is the one that tells you what repairs are to be made. Isn't that so? A. The agent?

Q. Yes. A. He has a requisition for repair. He has a repair list issued to him or submitted to him by the ship's personnel.

Q. And he arranges for the repairs? A. If it is under $10,000.

Q. Otherwise do you say he has nothing at all to do with repairs if it is over $10,000? A. He 464
supervises the repairs after we have awarded the contract.

Q. He has to take it up with you, if it is over $10,000? A. Right.

Q. But if it is under $10,000, he takes it up with no one? A. He has the repairs made himself. That's right. That is according to the M. & R. regulation, which you have. He is allowed a limitation of $10,000 of work.

Q. Now, you said something about if this boom was so defective or any boom was so defective that it was powdery—you understand what the term "powdery" means, do you not? A. Well, I 465
wouldn't say a wood turns to powder.

Q. But that was the question you answered. A. Well, he asked me—he asked me about, did I understand what powder—something would turn to powder, a defect?

Q. Yes. A. In my experience, wood does not turn to powder.

Q. But that was the question he asked you. You said nothing about your experience when he asked you that question. A. Will you repeat what I said before?

Q. Well, I am not going to repeat it. All I will
466 say to you, all I am asking you now is this: If a thing has got to be replaced, let us assume the boom was a bad boom which had to be replaced, or rather, it had to be renewed; renewed is really replacement, is it not? A. Yes, new part, with a new part.

Q. In your opinion, I mean, having testified now to usages and custom, when you use the word "renewed"— A. That is a new part.

Q. You mean to replace, to replace the old one with a new one? A. No, remove the old and re-
467 place it with a new one.

Q. That's right. A. That's right.

Mr. Fisch: That is all.

Juror No. 8: I'd like to ask this witness a question.

The Court: Ask me, sir.

Juror No. 8: First, I would like to know whose responsibility it would be in the event the boom was defective. Whose responsibility would it be to see that it got into the specifications?

The Witness: It would be the deck de-
468 partment. They would know all about the boom.

Juror No. 8: The War Shipping Board or the agent?

The Court: Read the answer.

(Answer read.)

The Court: Now, your question again? Would it be the deck department?

By Juror No. 8:

469

Q. —Of the War Shipping Administration or the agent's? A. The deck department, that is, the crew aboard the ship, when I speak of the men engaged in the deck department work.

Q. If no such thing were in the specification, would the War Shipping Administration have any responsibility to look around the ship to see if other things needed repairs outside of what were in those specifications? A. As a rule—as a rule, I have distinguished now between war time conditions and—

470

The Court: War time conditions is the question.

Q. As of January, 1944.

The Court: 1944.

A. As they go around the ship on the repairs, both the general agent and the War Shipping Administration man is looking at the same time. There may be an item that needs repair that the crew has overlooked, and they discuss it right there and say, "Well, now, we better do this for you. You overlooked that in submitting your requisition."

471

By the Court:

Q. Now, following out the juror's question, you told them the deck department; that is, the seamen on the boat, on the vessel, is that right? A. Your Honor, when I speak of the deck department, we deal with the officers of the ship.

Q. Officers of the ship? A. Yes, sir.

Q. And the officers of the ship are employees of
472 whom, the War Shipping Administration or the general agent? A. Well, I would assume the WSA.

Mr. Fisch: May I, your Honor, make this statement? I did not interrupt the answers of the witness, but I believe that, under the decisions, it is up to the Court to instruct the jury who had the duty of making the repairs and keeping these things in a safe condition; and that is the only reason I did not object, because it is a ques-
473 tion of law, not of fact.

The Court: All right, you may step down, sir.

(Witness excused.)

The Court: Call your next witness.

Mr. Parmer: Your Honor, may I complete the job on that wood? I have got the tools.

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474 SERGEJS BOLS, resumed the stand and testified further as follows:

Redirect Examination by Mr. Parmer (Continued):

Q. Can you complete the work that you began?

Mr. Fisch: I will put them right over here (referring to chips of wood from Exhibit K-1).

The Court: We will get an envelope and put them in an envelope. I will give you an envelope. Mark the envelope. 475

(Envelope and contents received in evidence and marked Defendant's Exhibit K-3.)

By Mr. Parmer:

Q. Now, Captain, I call your attention to the wood at the place that you cut. Can you see the grain of the wood there still? I mean here and here (pointing). A. Yes. 476

Mr. Parmer: Do you all see that?
The Jurors: Yes.
Mr. Parmer: That is all.

(Witness excused.)

The Court: Call your next witness.
Mr. Parmer: I want to call Mr. Oravs, the carpenter, please, and the interpreter, please.

477

(WALDEMAR VOLKOVIC, residing at 134 Lincoln Place, Brooklyn, N. Y., was duly sworn as an interpreter in the Latvian language.)

JANIS ORAVS, residing at care of Thor Eckert & Co., Inc., 19 Rector Street, New York City, called as a witness in behalf of the defendant, being first duly sworn, testified as follows, through the interpreter:

Mr. Fisch: Your Honor, may we have a
478 preliminary examination of the interpreter, please?

WALDEMAR VOLKOVIC, the interpreter, was examined by plaintiff's counsel, as follows:

Direct Examination by Mr. Fisch:

Q. What is your business, please? A. I am a chief engineer at McNulty Shipyard.

Q. What Shipyard? A. McNulty.

479 Q. What is the business of McNulty? A. Ship repair yard, ship yard.

Q. How long have you worked for McNulty? A. Since 1942, that is three years.

Q. How did you become a witness in this case?

The Court: He is not a witness. He is an interpreter.

Q. An interpreter (excuse me). How did you become an interpreter? A. I was called from Mr. Parmer.

Q. You were called by Mr. Parmer? Do you
480 know Mr. Parmer? A. No. I didn't know him before. I know now.

Q. Didn't know him before? A. No.

Q. Do you know how your name was given to Mr. Parmer? A. It's hard to say. I think the captain.

By the Court:

Q. If you don't know, say "I don't know." A. I don't.

Q. Did you ever see Mr. Parmer before he called you? A. I don't—I didn't. 481

By Mr. Fisch:

Q. Did you ever interpret in court before? A. I did not.

The Court: What was your answer?
The Witness: I did not.

By Mr. Fisch:

Q. Did you know any of the parties in this case before you became an interpreter, the captain or the agent, Thor Eckert & Company? A. I know the captain before. 482

Q. You know the captain? A. Yes.

Q. How long have you known him? A. About seven years.

Mr. Fisch: Your Honor, couldn't we get an interpreter, an official interpreter, here in this court? I thought we had all kinds of interpreters.

The Court: We will adjourn till two o'clock. Do not discuss the case among yourselves nor permit anybody to discuss it with you. Do not visit the scene of the accident. Two o'clock promptly in your seats, please. 483

(The jury retired from the courtroom.)

The Court: They will tell me, Mr. Fisch, they have nobody who speaks Lettish. They will make an effort to get an interpreter, if

both counsel will agree to pay him. They
484 won't get him today.

Mr. Fisch: That will be all right. I will agree to stand my share of it.

Mr. Parmer: There is no objection to that.

The Court: If you wish to press the objection—

Mr. Fisch: It all depends, your Honor, the evidence—at the present moment, we have a man who is a friend of the captain.

The Court: I understand that.

485 Mr. Fisch: I don't know what he is going to testify to. I would say he is not a neutral interpreter, in the broadest sense.

Mr. Parmer: I will say perhaps you are right, but I cannot say that he is not. I know it is hard.

The Court: Do you wish to press your objection? That's all.

Mr. Fisch: Supposing we go ahead with the interpreter and maybe what he says does not amount to anything. I don't know.

The Court: Then, as I understand it, for the present you are withdrawing your ob-
486 jection?

Mr. Fisch: That is right.

The Court: All right. We will adjourn anyhow till two o'clock. The objection to the interpreter is presently withdrawn by Mr. Fisch.

AFTERNOON SESSION

487 Mr. Fisch: May it please the Court, at this time we move to strike out so much of the testimony of the witness Peterson which is in substance or in effect an opinion upon whom the duty to make the repairs rested, as such an opinion is incompetent. The repairs and whose duty it was to make the repairs is stated in the contract and in the regulations is a question for your Honor to decide.

Mr. Parmer: May I be heard on that?

488 The Court: Yes.

Mr. Parmer: The duty on which Mr. Fisch relies in this case is a duty arising from the contract solely. The question was asked of a representative of one of the parties to the contract, he was asked for his definition of the obligation under the contract, to which he or his principal was a part. His answer was entirely relevant to state what the terms of the contract were as understood by the parties.

The Court: I will grant the motion to the extent of striking from the record that 489 portion of the answer which was given in opinion form.

Take an exception, Mr. Parmer.

Mr. Parmer: Exception.

The Court: The answer, I think, was "I assume." I think the witness used the word "assume." That is what I am referring to.

Mr. Parmer: Very good. "I assume that they were employed by the W.S.A."

JANIS ORAVS, resumed the stand, having been
490 previously duly sworn, testified as a witness in behalf of the defendant, through the interpreter, Mr. Volkovic, as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Oravs, what is your business and employment?

The Interpreter: He is a carpenter.
The Court: What is it?

491 A. I am a carpenter.

Q. Are you employed on a ship? A. Yes.

Q. Is that the Steamship Everagra? A. Yes.

Q. Were you employed on the Steamship Everagra at the time of the accident to the longshoreman on January 27, 1944? A. Yes.

Q. Did you see the accident happen? A. Yes.

Q. Now, using this model which is marked Defendant's Exhibit E, can you tell us or point out to us where you were standing? A. Yes.

Q. Will you come down here and point out where you were standing when the accident happened?

492 (Witness left the stand and approached the model.)

A. At the moment of the accident, I was standing right here.

By Mr. Parmer:

Q. I call your attention to the fact that you are pointing to the coaming. Do you mean you were

standing on the coaming or on the deck near the coaming? A. I was standing on the deck. 493

Q. Let us mark that "OR" in pencil for Oravs.

(Model so marked.)

Q. Is that the place now where you were standing? A. Yes.

Q. Now, tell us what you saw happen, first. A. First I was watching the longshoremen discharging the cargo, and I took a look in the hatch how much cargo are left.

Q. Is left? A. Is left.

Q. Was there anybody with you at the time? 494
A. Yes.

Q. Who was that? A. This gentleman.

Q. This gentleman over there?

Mr. Parmer: Will you rise? What is your name?

(The man addressed: Belochioscik.)

By Mr. Parmer:

Q. You looked down and you saw what cargo was in the hatch? What did you see happen next? Go 495
right on and tell us everything you saw up until the time of the accident. A. Then the accident was happened.

Q. Tell us what happened, please, everything you saw. What happened then?

The Court: Might I suggest that you take your witness around on your side, so the jury can see what he is doing?

Mr. Parmer (addressing the interpreter): Will you ask him to begin again?

The Court: Did you see that, ladies and gentlemen of the jury?

A Juror: No.

The Court: The answer is No. Ask him to demonstrate that again.

Mr. Parmer: Will you ask him to demonstrate that again? Now, to be sure, will you translate that in English?

The Witness (through interpreter): I was standing here at the point marked "OR" and watching the longshoremen work. The port side man, who handled this line, kept pulling the load, and the splice of this manila rope got caught in the top block.

Mr. Parmer: Tell him to continue.

(Witness spoke in Lettish.)

Mr. Parmer: Now, can you translate all that into English?

A. When the load was lifted up and and the port side—

The Court: Please do better than that. Talk up, Mr. Interpreter. Go ahead. Start again now.

A. When the load was lifted up and the splice of the rope was caught in the top block, in the same time, the starboard man kept pulling his line, here, and the starboard boom kept coming up, because that splice was caught in the block. When the block was nearly perpendicular, the port side man let

his line go free, and the boom fell; and in the same time, get cracked here, in the place. 499

Q. What happened to the man who was running this drum on the starboard side? What did he do? A. At the moment when the boom cracked, the man who handled this line jumped back in back of this Simpson post.

Q. Sampson. A. And the falling stay hit him on his head.

Q. And what happened to the boom, the broken part, the upper broken part of the boom? A. When the boom broke, it fell in here between the winch and this bulkhead. 500

Q. Mr. Oravs, can you demonstrate by means of this model the twisting force put upon this boom by what you described as having seen happened?

Mr. Parmer: If he needs anybody to hold anything, why—

The Interpreter: I will hold it.

Q. Go ahead, tell us. A. When the port side man pulled the load out and splice of the rope, it caught in here in the block. The starboard man pulled up his starboard boom—

Q. Yes? A. —so hard against the heel block nut of the gooseneck and the boom got twisted, the boom reinforcement is steel, got twisted. Now, in same time— 501

Q. Continue with his answer. I want you to complete his answer. A. That gooseneck pin and the boom reinforcement got twisted, and in same time, the port man on the port boom let his line go, and the boom fell and broke; and also that man who operated the starboard boom had one-third of this rope caught over the leading line, the

leading end, that is, this one that goes here (demonstrating). And he was unable to quickly loosen up his boom, the port side boom, to let go down. One-third was caught.

Q. I want you to put that back in the place where it was when it was caught up against the Sampson post in order so that the jury can see the strain and the direction of the strain that was put upon the top of that boom at that time.

Mr. Parmer: Can he produce the same effect by pulling? He does not have to wind the thing around each time. Tell him when the boom was pulled up, did it go over this way or did it stop here at the Sampson post?

Q. It stopped at the Sampson? A. It stopped at the Sampson Post, this (demonstrating). The boom was pulled up and stopped at the top of the Sampson post.

Q. Now, let us fix this guy so that it will stop there. Now, will you put the strain on this? Does that show the twist? A. Yes.

Q. Now, it was after that that the boom fell down? A. Yes.

Q. Was it after that that it broke? A. Yes, it broke after it fell.

Q. Now, with regard to this turn that you say was overriding the other turns on the niggerhead, I want you to tell us what you saw this winchman doing with regard to that? A. He jumped back.

Q. I want to know what he did before he jumped back with regard to this turn that you saw overriding the other turns? A. When the turn was turned, he couldn't do anything. He tried to run

at the winch and stop the steam stop valve, but the winchman did it, and he jumped back of the Simpson post. 505

Q. You say you saw him try to get the turn off? Is that what you mean? A. No. He didn't say that. He didn't try to do it, because that was impossible to do. H tried to stop the steam stop valves, tried to stop the winch, because there was another, third man, assigned to the job.

Q. What did you see that man do who was at the steam controls of the winch? What did he do? A. He stopped the winch.

Q. When did he stop the winch? A. He stopped the winch when the boom was broken and down on the deck. 506

Q. Well, did anybody try to stop the winch before the accident happened? A. No.

Q. Did you see any gangway men around there besides these three winchmen? A. There was a sling man also.

Q. A sling man? What does a sling man do? A. He watches the sling or the load coming out from the cargo hold, follows it up to the side of the ship, and gives orders to lower down.

Q. Did you see that sling man do anything just before the accident? A. He didn't do anything. 507

Q. Did he give any warning to anybody? A. He didn't hear the sling man to give any warning to the workmen but he run himself forward in the ship.

Q. You mean he ran? A. —Forward in the ship.

Q. In the way you are pointing now? A. That is in the direction of this forward bulkhead.

Q. What did you do after the accident happened? A. I went over to look what happened, which that man who operated this fall—

Q. What did you do when you got there? A. I
508 tried to see what happened to him, and then I went to call the captain.

Q. What did you observe about that man at the time that you got there? A. In my opinion he was a little dizzy.

Q. Was he lying down or standing up? A. He was sitting on the bunker hatch.

Q. Which bunker hatch? I show you Defendant's Exhibit C. A. He was sitting there at the bunker hatch.

Q. You are pointing to the forward inboard corner. A. Yes. He was sitting at the forward end
509 of the bunker hatch.

Q. Was there anybody with him at that time? A. Three came and brought him away.

Q. I want to know whether at the time that you got there there was anybody with him then. A. There wasn't anybody around him.

Q. Were you the first one to get there with him? A. Yes.

Q. Did you see any blood on his head? A. I cannot remember seeing any blood, but—but he was holding his hand to his head.

Q. Did you see any guy wires or other wires around him or near him? A. Only this guy wire
510 was close to him down on the deck.

Q. Close to him down on the deck?

Mr. Parnier: Referring to the guy wire running from the boom which broke to the aft, that is, the aft guy wire on the boom which broke.

That is all.

Mr. Fisch: Your Honor, I think he can go back, because I don't need this model for my questions.

The Court: All right. Tell the witness to resume his seat, Mr. Interpreter. 511

(The witness returned to the witness chair.)

Cross Examination by Mr. Fisch:

Q. How many years have you been working on that boat? A. April 29, 1939.

Q. Did you know the captain? A. Yes.

Q. Do you speak the same language he does? A. Yes.

Q. Are you a friend of his? A. I am not friends with him because I cannot be friends with the captain. 512

Mr. Parmer: I didn't hear the answer.

The Court: "I am not friends with him because I cannot be friends with the captain."

By Mr. Fisch:

Q. Have you told the captain how this thing happened? A. Yes.

Q. How many times did you tell him that? A. I told him only once. 513

Q. When was that? A. Right after the accident happened.

Q. Who told you to come here in court to be a witness? A. From War Administration, they told me.

Q. Who? What man? A. I don't know the name. When the accident happened, I was investigation, and I signed my statement. What is the man's name who called me in court, I don't know.

Q. Did the captain tell you to be a witness in
514 court? A. Yes.

Q. When did he tell you that? A. He told me to be ready for last Monday, but something happened and was postponed to Tuesday.

Q. What did you do on this ship? What was your work? A. I am a carpenter.

Q. What kind of work do you do? What do you carpenter about? Is it the deck, the tween deck, the hold or, the what? A. I do any kind of carpentry on board.

Q. Now, how long had you been watching this operation before this accident happened? A.
515 About 20, 30 minutes right after my lunch.

Q. Does your work keep you busy all day long or have you periods when you do nothing? A. Yes, there are times between.

Q. Take January. You had about ten hours of daylight. In those ten working hours, how much would you have off and how much time would you work? A. I must work eight hours a day.

Q. You told us before that you have periods when you do nothing. Do you do nothing for an hour in those eight hours? Do you do nothing for two hours or three hours or four hours, or what?
516 A. We have coffee time 10 o'clock in the morning. Then we have one hour lunch hour, between 12 and 1, and 3 o'clock P. M., we have coffee time again.

Q. And outside of the periods you have just mentioned, do you work all the time? A. No.

Q. Even between the periods, about coffee time and lunch time, and the other times, there are times you do nothing? Is that right? A. Yes.

Q. What do you do when you do nothing? Where do you go? Do you stay on deck or do you

go into some room? A. When I am not employed in my duty, I keep my tools in good order. I sharpen them, and so on. 517

Q. Where are the tools? A. They stay in the aft poop.

Q. Where is that? Is that above the deck, below the deck, or where? A. Right below aft the poop deck.

Q. By the way, were you helping these men in this work?

Mr. Parmer: "These men," you mean the longshoremen? 518

Q. The longshoremen, yes. A. No.

Q. You were watching, is that right? A. Yes.

Q. How many hatchways were there on the boat? A. Five, five cargo holds.

Q. How many years experience have you had on a boat? How many years have you been at sea? A. Nineteen years.

Q. And you have seen stevedores or longshoremen loading and unloading before, didn't you? A. Yes.

Q. And yet you were watching these men for twenty minutes? A. Yes. 519

Q. Why? A. Because I had nothing to do, and that was right after lunch hour and I had no other duties.

Q. Was this loading something new you hadn't seen before, you had to watch for twenty minutes? A. No.

Q. The five hatches on that boat were being worked at that time, weren't they? A. Yes.

Q. Then why did you pick out No. 3 hatch to watch them do the work when there were other hatches? A. I was coming from my lunch hour, which was located in forecastle.

Q. You came from your lunch but you stopped
520 in No. 3 hatch for 20 minutes. Is that correct?
A. Yes.

Q. And you had a friend with you that stopped with you?

Mr. Eisch: Will you stand up, please? That is the young boy (indicating)?

A. Yes.

Q. Did you say anything to him about, "Let us watch this thing, the way these longshoremen work"? Did you say that to him? A. Yes.

521 Q. "Let us watch"; is that right? A. Yes.

Q. Why did you ask him—why did you tell him to watch this work here at No. 3 hatch? A. We were interested to see the cargo discharging.

Q. Did it make any difference what hatch you picked out to see the cargo being discharged, whether it was 3 or 4 or 5 or 2 or 1? Did that make any difference? A. No, I didn't know accident would happen.

Q. You didn't know that, did you? A. No.

Q. You didn't wait for the accident, did you? A. No.

Q. Now, did the accident happen the first day
522 the boat was in port or had the boat come a few days before into port? A. A few days after the ship arrived in port.

Q. When you say a few days, do you mean that they were loading and unloading the ship for a day or for two or for three or for four before this man got hurt? How many days before? A. I can't remember that.

Q. Was it more than a day? A. More.

Q. Now, these booms that I am pointing to,

there are two booms, are there not, attached to a king post? A. Yes. 523

Q. Is this the front part of the ship, where I am pointing to? A. No.

Q. This is the front part? Is that correct? A. Yes.

Q. Then this boom would be the starboard or the right side of the ship, is that correct? A. No.

Q. It wouldn't?

Mr. Parmer: According to our ways of calculating, I do not know what the Latvian way is. 524

Q. Anyway, this part would be the right side of the ship? A. Yes.

Q. And this part would be the left side of the ship? A. Yes.

Q. And you came down here a few minutes before and you were showing the lawyer just what happened. Did you notice these pieces of cotton alongside the boom? Did you notice that? A. Yes.

Q. Instead of the cotton at the time of the accident the thing that held the boom in position was broke, isn't that so? A. No. That was the steel wire. 525

Q. All of these are steel wires? A. All stays and ties are wires but the cargo handling lines was rope, manila rope.

Q. The cargo handling lines was with the line wound up on the niggerheads? A. Yes, they was three inch manila ropes.

Q. And you say one of those ropes was spliced? A. Yes.

Q. What do you mean by spliced? A. By splic-

ing, I mean take end of a rope, make an eye, and
526 that short end, we twist to the rope, make an eye on the end of the rope; and that part what is spliced through, what is put through the rope, call for a splice.

Q. Do you mean splicing where you put two ends of the rope together to make one piece? A. Yes. That is a splice.

Q. This rope on the niggerhead, how many feet of rope were there on the niggerhead? A. About twenty fathoms.

Q. Will you show us here by pointing out some
527 part of this ruling one fathom, the length of one fathom?

The Interpreter: Between his two hands are one fathom.

The Court: The witness stands up and stretches both arms out as far as he can from his body.

By Mr. Fisch:

Q. And you say that this rope was twenty fathoms? A. Yes.

Q. In how many places was it spliced? A. Only
528 in one place.

Q. How do you know it was spliced? A. I can see it, because it must be done.

Q. Did you see it or do you base your opinion because it must be done? A. That must be done.

Q. Now, I am calling your attention to the niggerhead on the left side of the ship. Was the rope on the left side of the ship—rather, left niggerhead—was that the rope that was caught or was it on the right side? A. That was on the starboard side.

Q. That is this side that I am pointing to now? A. Yes. 529

Q. Is this the rope that you say got caught?

Mr. Parmer: That got caught on the drum.

Q. Was it caught on the drum? A. Yes.

Q. Now, you told the Court and jury before that the part where it's spliced got caught. Did it get caught on the drum or did it get caught up here on the boom? A. The splice got caught in the port side, top block, and the turn or twist of the rope on the niggerhead was on the starboard side. 530

Q. From the time you saw the splice get caught on the top of the boom until the man got hurt, how much time passed? A. It's hard to say, because the winch was running very fast. Maybe it is a split second's time.

Q. And in that split second, you saw the splice get caught? You saw on top of the boom, you saw the niggerhead on the right side, the coils wound in the improper manner. You saw the boom on the starboard side go all the way in a vertical or straight position. You saw the boom fall and break, and this man holding his hand. You saw all that? A. Yes, it happened, everything so fast, one after another. I saw the splice get caught in the block and the starboard boom getting up. 531

Q. When you say "block," you mean a pulley, don't you? A. Meaning by block, cargo discharging block outside of steel shield between two steel reinforcements. That shield turns around and acts, what comes through the middle of the wheel, and get tightened up on each side, on two steel reinforcing pieces.

Q. But the splices that got caught got caught
532 at the place where there is a wheel? It was on a wheel, wasn't it? A. Yes, the splice got caught on top of the wheel in the small opening.

Q. Did you look up at the top of the boom before the accident or after the accident? A. After.

Q. You did not know that this splice was going to get caught on the top of the boom, did you? A. No, I did not know.

Q. But that spliced rope had been going through that pulley, through that box, as long as you have been on board the boat, hasn't it? A. All blocks are made for a steel wire what is much smaller
533 in diameter, but longshoremens used about three inch manila rope, and splicing iron, which means in the splice place, the diameter are much larger even as the rope.

Q. Now, Mr. Witness, you say that you saw the man who got hurt do some running before he got hurt? A. No, that is not the man who was hurt, but that was the sling man who was running forward on the ship.

Q. The man who got hurt, did you see him do anything before he was hurt? A. Yes, he was handling the starboard cargo line.

534 Q. That is all he was doing? A. Yes. He was his starboard rope. There's four mens are designed to work on that No. 3 hatch: One man standing at the winch steam stop valve, one man on starboard cargo line, third man on port cargo line, and the fourth man are the sling man.

Q. Was your friend there when the accident happened? A. Yes.

Q. Were you there when the accident happened? A. Yes.

Q. Was he standing alongside of you, your

friend? A. He was about two or three feet away from me. 535

Q. He was also looking at this No. 3 hatch, wasn't he? A. Yes.

Mr. Fisch: That is all.

Redirect Examination by Mr. Parmer:

Q. Mr. Oravs, where was this splice that you refer to which was caught in the block? Will you tell us where the splice was? A. The port side cargo line on the end is the splice located.

Q. Can you point out here on this where the splice was? A. On each end of the starboard lines are a splice made to perform like an eye. That shorter end are twisted to the rope splice and an eye made. Same thing that will be will show for port side too. On the starboard line is same eye made. These two eyes are connected together with the shackle. 536

Q. We know what a shackle is. A. And in that shackle are the cargo hooked in which one picked up the cargo from below.

Q. In other words, just to illustrate what a splice is, Mr. Oravs, you took the end of a line and bent it around, as I have done there, just making a rope? What do you do now to splice the line? A. When I bend the rope with the eye, then I open up that short end here, the rope. 537

Q. You open it up in—

The Court: Don't both speak at once. We will drive the reporter crazy.

A. I opened the short end by strands, then I twist that rope against how she is manufactured, open

up the twist [illegible] the rope, and the short ends are—
538 I am putting through, as supposed to be done. That we [illegible] the short end from coming out from the line, [illegible] in same time, the diameter or the measurements of the rope, the splice place comes larger, because there is twice as much material involved.

Q. And this splice that you say went through the heel was the splice which was at the place where the two cargo falls were joined, is that correct? A. Yes. That was the splice that was caught in the block.

Q. Will you resume the stand?

539 (Witness resumed the witness stand.)

Q. How long have you been a carpenter, Mr. Oravs? A. Seven years.

Q. Are you acquainted with good wood and bad wood? A. Yes.

Q. And is that by reason of your experience as a carpenter? A. Yes.

Q. Did you observe the broken parts of the boom after the accident? A. Yes.

Q. Was the wood at the broken parts in good condition or in bad condition? A. That was in
540 good condition.

Q. Now, I show you these two exhibits, K-1 and K-2. Will you tell us whether there is anything bad about the condition of that wood even today? A. No.

Mr. Parmer: That is all.

Recross Examination by Mr. Fisch:

Q. Now, Mr. Witness, you told us the rope was twenty fathoms long? A. Yes.

Janis Oravs—for Defendant—Recross.

Q. Now, assume that the piece that I hold in my hand is a rope, the same kind of rope that you saw on the niggerhead, and it's twenty fathoms long. If you want to make one piece out of it, you have splice both ends, isn't that so? A. Must make a splice. 541

Q. Now, this winch or the winches, the niggerheads, and the work was being done all that day the same way, wasn't it? A. Yes.

Q. And did you before the accident, let's say, at 10 o'clock in the morning or 11 or 12 or 1 watch the rope, the manila rope, go through the block on the left side of the boom, as they were working, the longshoremen were moving the cargo of cocoa beans from the hold? A. I was not watching that rope moving forth and back since 10 o'clock or 11 or 12, as you meant, but it was happened I passed by the hatch after my lunch, and I just stopped for curiosity to look at what, how much cargo more there are to discharge, and as the rope got caught or the splice got caught in the block, I remember well, because that—that happens very unusual, because so far nobody lift the load up, that is, the end of the rope. That is danger to work so high. That for the starboard boom got lifted up and the man got hit on head. 542

Q. In the twenty minutes that your watched this operation, how many times did that splice go through the block? A. That splice didn't go through the block at all, but when the splice went in in the block then the accident happens. 543

Q. Were they working during all the time you were there for twenty minutes? A. Yes. Yes, they were.

Q. Was that niggerhead on the left side worked at all for the twenty minutes? A. Of course, the port side niggerhead and the starboard side nigger-

head are running at the same time. The port side
544 man lifts the cargo up and the starboard side man pulls the cargo over the side of the ship and lowers down.

Q. Do you want to tell the jury that this is the first time the splice got into the block and the accident happened then? A. Yes.

Mr. Fisch: That is all.
The Court: You may step down.
Mr. Parmer: Just one question.

By Mr. Parmer:

545

Q. This arrangement of guy wires, the way the booms are guyed by the guy wires as shown in this model, is that the way it was at the time of the accident? A. No. It is not exactly the same because the winch, only with the difference as this niggerheads are little different on my ship as they are here on the model.

Q. I am not talking about the niggerheads or the drums. A. I am talking about this.

The Court: Didn't you have that before?
Mr. Parmer: I don't believe I did get
546 the guys.

Q. I just meant these guy wires. Is this the same way as it was at the time? A. Yes.

Mr. Parmer: That is all.
The Court: All right, step down.

(Witness excused.)

Mr. Parmer: I would like to know

whether the gangway man, Mr. Forti, is in court. 547

Mr. Forti: Here I am.

Mr. Parmer: And Mr. Paganano, the other winchman? Thank you.

BRUNO J. AUGENTI, residing at 100-07 Askan Avenue, Forest Hills, Long Island, N. Y., called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer: 548

Q. Mr. Augenti, what is your business? A. Investigator and surveyor, casualty—marine casualty surveyor.

Q. What is that? A. Marine casualty.

Q. Did you go on board the Steamship Everagra on January 27th? A. I did.

Q. After this accident? A. Yes, sir.

Q. What time did you get there? A. Around two o'clock, 2:10, or something.

Q. And did you proceed to make an investigation? A. Yes.

Q. What did you find when you got there? A. 549
As soon as I got on board, I was received by the chief mate, and he took me down there to No. 3; and I saw that the starboard boom had broken about three feet off the swivel pin of the gooseneck, and the long piece was lying athwart ship on deck, and the stump was hanging down off the Sampson post.

Q. Did you arrange to take photographs? A. Yes, I did.

Q. And what arrangements did you make and

what was done pursuant to those arrangements?
550 A. Well, after my survey, I noticed certain facts which I thought had to be recorded by some kind of proofs of evidence, and I thought that the photographs would be the best way to indicate the condition which I found at the time of the investigation.

Q. And what photographs were taken and when were they taken, and were you present? A. I couldn't get a photographer the same day.

Q. When did you get one? A. So I instructed the chief mate and the captain and the other officers to watch the condition, to watch the deck as
551 a whole, and not let longshoremen touch anything, and to keep a watch throughout the night, if necessary, for the following day when I returned; and I did get back that morning, the following morning, with a photographer, and I noticed the condition was identical as they were when I left that afternoon; and we took photographs, several of them.

Q. Did you say seven? A. Several.

Q. Now, in addition to the photographs which have already been put in evidence, were these photographs taken at your request and under your
552 supervision? A. Yes.

Mr. Parmer: I ask to have that marked.
The Court: No objection, mark them.

(Photographs received in evidence and marked Defendant's Exhibits N to Q inclusive.)

By the Court:

553

Q. When you say the starboard boom broke and lay athwart ship, you mean it laid across the deck? A. That's right, between the afterbulkhead and the winch.

By Mr. Parmer:

Q. Did you do anything with respect to any of the broken wood? A. Yes, I did.

Q. What did you do? A. After inspecting the stumps and the point of fracture, I thought that it would be a good idea to cut off the stump and bring it over to the captain's room, and preserve it. 554

Q. Did you bring any piece with you? A. Yes, there were several other pieces of wood on deck, and I took a piece of sliver, and I marked it.

Q. With your own name? A. Put my name on.

Q. Is [redacted] the Exhibit K-2 there that is on the floor, that small sliver? I don't know the name of the exhibit. A. Yes, sir. That is my name.

Q. That was marked by you at the time, correct? A. That is right.

Q. Now, did you note anything with respect to the stump that was left on the mast? A. Yes, I remember I asked the captain. 555

Q. Don't tell us what you asked. What did you notice? A. Well, there was a nick, a bruise.

Q. Yes? A. And I wanted the captain to let me have that stump, but he said that he needed it.

Mr. Fisch: Wait a minute. I object to what he said.

Mr. Parmer: Never mind what he said.

By the Court:

556 Q. Did you get it from the captain? A. No, he refused to give it to me.

Mr. Fisch: We move to strike out "he refused."

The Court: Yes. That may be stricken.

By the Court:

Q. Did you get it or not? A. No, I did not get it.

557 Q. And what did you do with respect to that nick? A. Well, I had the photographer take some close-up of that particular part of the stump and also had the photographer to remove part of the wood which was stuck to the bolt, to the upper nut of the swivel pin of the gooseneck.

Q. Now, here is a photograph. Is that the close-up or one of the close-ups to which you have just referred? A. Yes, sir, and the particles of wood are still there. Some of them were removed by the photographer.

The Court: Keep up your voice, Mr.

558 Augenti.

The Witness: Yes.

Q. Will you point out the nut to which you have just referred? Defendant's Exhibit O. Is that the nut? A. The nut, of the swivel pin nut.

Q. All right. We will have an arrow drawn to it with the word "nut" written alongside it. Now, you point to certain pieces, that is, you refer to certain pieces of wood adhering to the nut, and other features at the time. A. That's right.

Q. Will you point them out in the picture? A. These are the small pieces of wood. 559

Q. All right. Now,— A. And over the nut in various places in the immediate vicinity.

Q. All right. Now, point, mark an arrow pointing to some of these pieces of wood on the swivel. A. That's right. The next thing I noticed was the bruise on the stump, which corresponded when the stump was lifted up—

Q. Yes? A. —to the nut and the swivel.

Q. And you tried that out? A. I tried that out, and they matched perfectly, which indicates that the bruise—

Q. Never mind what it indicates. It is for the jury to say. Now, did you save any of those pieces of wood referred to in the photograph? A. I did. 560

Q. Did you put them in any envelopes? A. Yes, sir

Q. Are these the envelopes with your name on it? A. Yes, sir; they are closed too.

Q. Will you open them up? First let me show this to the jury.

(Envelopes exhibited to the jury.)

Q. Now, you have here two envelopes, do you, Mr. Augenti? A. Yes. 561

Q. —One with the inscription, "Taken from the boom January 28, 1944," signed by the third mate and also by yourself. A. Yes. I had him sign and seal it. I had him seal it.

Q. Will you open that up and bring out the contents?

(Witness did as requested.)

Mr. Parmer: Could that envelope be
562 marked, please?

The Court: Mr. Fisch has no objection to marking the envelope?

Mr. Fisch: No, I haven't.

(Envelope received in evidence and marked Defendant's Exhibit R.)

Mr. Parmer: Your Honor, I offer the contents plus the envelope.

The Court: Yes, I understood that to be the offer.

563

By Mr. Parmer:

Q. Now, have you opened the second envelope? A. Yes, I have.

Q. And this envelope is inscribed, "Taken from top of nut January 28, 1944," signed by the third mate and also yourself. Right?

Mr. Parmer: May I offer this envelope and its contents too, please?

(Received in evidence and marked De-
564 fendant's Exhibit S.)

Q. Now, will you pour out the contents of that envelope, please? A. Not much (indicating).

Q. Pour it out. And that was taken from the nut? A. Yes.

Q. —Still adhering to the nut? A. Yes, right here.

The Court: Better not pass that around because that will be spilled. Just let the jurors take a look at it.

(Contents of the Defendant's Exhibit S shown to the jury.) 565

The Court: Now return that to the envelope, please.

Mr. Parmer: That is all.

The Court: Cross-examine.

Cross Examination by Mr. Fisch:

Q. Mr. Augenti, by whom are you employed? A. Presently?

Q. Yes. A. With the Marine Index Bureau.

Q. Marine, what? A. Index Bureau. 566

Q. Did you ever do any work for the lawyers defending this case? A. Not on this case, no.

Q. No, I don't mean this case, for the lawyers. A. On other cases?

Q. Yes. A. Yes.

Q. For how many years? A. Since 1926.

Q. I have seen you—

The Court: Keep your voice up.

A. 1926.

Q. I have seen you around the courts a good deal, haven't I? A. Yes, Mr. Fisch, and I have seen you too. 567

Q. You know your business, don't you?

The Court: Well, sustained.

A. It is assumed—

Q. Your business is investigating, is that correct? A. Yes, sir.

Q. You get paid for investigating? A. Yes, sir.

Q. And when you got on this ship that day, you

wanted to preserve the evidence, didn't you? A.
568 Absolutely.

Q. —Anything you thought was important? A. Yes, sir.

Q. And you thought it was important to get the top part of the boom, that is, the boom that still remained attached to the— A. Yes, sir, I thought so too.

Q. You thought that was important? But they refused to give it to you? A. Not exactly. It was explained to me, they said they needed some parts.

Q. But you knew— A. They didn't have a
569 spare.

Q. Look. Will you come down here, Mr. Augenti? A. Surely.

Q. Just stand over here so the jury can see this operation.

(Witness stands in front of the jury.)

Q. This is the part that broke off. You can see the very end over here, is that correct, Mr. Augenti? A. Yes.

Q. This part is wood, marked "wood"? A. Right.

570 Mr. Fisch: Referring to Defendant's Exhibit F.

Q. This part here is metal (indicating)? A. Metal.

Q. This part on top here is also metal? A. Yes.

Q. And then on the sides, there are two strips of metal? A. Yes, sir.

Q. Now, you know, don't you,— A. Two jaws.

Q. You know that to put in a new boom, you'd have to take this part out, wouldn't you? A. Yes.

Mr. Fisch: All right, get back now.

Mr. Parmer: Would you mind saying, 571
"Please"?

Mr. Fisch: Please. Excuse me. We are old friends. Don't worry. He can take care of himself.

(Witness resumed the witness chair.)

The Court: All right, next question.

By Mr. Fisch:

Q. Did you ever make any attempt to get any 572
part of that top piece after the first time? A. No, I did not.

Q. Though you thought it was important? A. Well, the captain explained—

Q. No. Did you think it was important? A. I thought it was a good idea to preserve that too.

Q. You brought these little shavings so that the Court and jury would get an idea of the kind of wood that was there, is that right? A. I thought in the case of litigation that those articles of wood would be important. Absolutely,—

Q. Did you know— A. —to show that the 573
boom—

Q. Did you know—

Mr. Parmer: Wait a minute. Let him finish the answer.

Q. Excuse me. Just a minute. A. To indicate that the lower part of the boom struck the pin at the gooseneck.

574 Mr. Fisch: Now, we move to strike that out and we ask that my question be read first and see whether he gave an answer in response to that.

The Court: Motion denied. Next question.

Mr. Fisch: We respectfully except.

Q. Now, so you put the wood in two envelopes, is that correct, the top and the bottom, and you ordered photographs be taken? A. I did.

575 Q. You took complete charge of everything that was to be done in the way of investigation? A. I certainly did. I took measurements, accurate measurements, as a matter of fact, of all the guys, measurements of the deck to the various shackles where the guys were fastened to and all other measurements in connection with the accident.

Mr. Fisch: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

576

VLADISLAUS V. BELOCHVOSCICKS, residing at 330 East 11th Street, New York City, called as a witness in behalf of the defendant, being first duly sworn, testified as follows through the interpreter Valdemar Volkovic, as follows:

Direct Examination by Mr. Parmer:

Q. What is your job now? A. A. B.

Q. What is your last ship? A. James Lykes.

The Court: Have a seat there, Mr. Interpreter. Maybe we won't need you. 577

By the Court:

(Witness testifying in English.)

Q. When you say A. B., you mean able bodied seaman? What nationality are you? A. Latvia.

Q. Native of Latvia? You speak pretty good English. A. Not too good.

Q. Not so good? A. Not so good.

Q. You understand the questions I am asking you? A. Yes, I understand. 578

By Mr. Parmer:

Q. Were you an A. B. on that ship? A. Yes.

Q. Is that a War Shipping Administration boat? A. Yes.

Q. Now, were you employed on the Steamship Everagra when this accident happened? A. Yes.

Q. What was your job on that boat at that time? A. The same job. A. B.

Q. Did you see the accident? A. Yes, I see the accident. 579

Q. Where were you standing when it happened? A. Close to No. 3 hatch.

The Court: Just keep your voice up.

A. Very close to No. 3 hatch, the hold where take out the cargo.

Q. Can you point out down here where you were standing? A. Yes.

Q. Will you come down and do it?

580 (Witness left the witness chair and approached the model.)

A. I been over here, port side, little bit toward the port side.

Mr. Parmer: And he is pointing to the forward edge of the hatch.

Q. Do you see where this letter is here, "OR"? A. Yes.

Q. How near to that were you? A. Port side.

581 The Court: Make your answer over again.

A. Oravs' side, I was between him and port, port side ship.

Q. What were you doing there? A. Was look down hold.

By the Court:

Q. Looking, what? A. Look down in hatch, down in hatch.

582 Q. Looking down in the hatch? A. Yes. Take out the cargo, discharging cargo.

Q. Looking down the hatch where they were discharging cargo?

By Mr. Parmer:

Q. What did you see happen? Tell us everything. A. I see happens—

The Court: Now, go slow.

A. —come out the sling. Take up sling on the side over there. I look. There is the sling, which comes too close; another time is box fell out of the slings. Look at me. At that time, I see— 583

The Court: Not so fast., Not so fast.

A. Here, take the close of the block.

By the Court:

Q. They do, what? A. Take up the—

Q. What about that "claws" of the block? A. Coming the splice in the block, in the block, and that time, I see coming this boom, come up. I jumped on port side. 584

The Court: He saw the splice in the block.

Q. Now, what else did you say? You saw the splice in the block? A. I say, this boom—

Q. You saw the starboard boom come to—

The Court: He indicates an almost perpendicular position. All right. 585

A. After that—

Q. You jumped? A. I jumped. I jumped to the port side.

The Court: He jumped to the port side.

A. Yes. The sling caught, catch.

Q. What? A. The sling fall down and catch me.

586 The Court: "So if the sling fall down it would'n't catch me."

A. For that, I jumped away.

The Court: "So, I jumped away."

Q. What happened? A. After that, that man I saw here, he slack this.

The Court: He saw the man at the winch slack.

587

A. Slack this manila line.

Q. Slackened the manila line? A. Slack the manila line sling.

Q. Slack the manila line sling? A. And this sling fell down.

Q. The sling fell down? A. And after the boom broke.

Q. And the starboard boom broke.

By Mr. Parmer:

Q. When the draft fell down, what happened to
588 the boom? A. This boom? This boom, at the same time, come down too.

Q. And is that when it broke, after it fell down? A. Yes, that, after she broke.

The Court: Anything else, Mr. Parmer?

Mr. Parmer: Just a few more questions. I think he can come on back here.

The Court: All right. Come back, Mr. Sailor, we will call him.

(Witness resumed the witness chair.) 589

By Mr. Parmer:

Q. Did you see the injured man? A. Yea. Was running the winch?

Q. Yes. A. Yes.

Q. Did you see what happened to him? A. No, sir. I no can't see. There's—

By the Court:

Q. All the lawyer asked you, did you see the man 590
that was hurt? A. The man?

Q. Yes. Did you see the man that was hurt? A. After I see him down.

Q. Down where? A. Down the deck; some guys pick him up.

Q. You saw somebody pick him up? A. Yes, pick up him.

By Mr. Parmer:

Q. Whereabouts did you see him? A. Bunker hatch, very small hatch, between the Sampson post. 591

By the Court:

Q. Between where? A. The Sampson post and the hatch, small bunker hatch.

Q. And the small bunker hatch?

By Mr. Parmer:

Q. Did you see him get hit with anything? Did you see him get hit with anything? A. No.

592 Q. Did you see where the boom went that broke? A. Yea.

Q. Where did you see it go? A. Is go between winch this bulkhead.

Q. Did you see that happen? A. Yes, I see that happen.

Q. At that time did you see the starboard winch man at the drum? A. Yes.

Q. Did you see him there when that thing went through there? A. The starboard winch man is jump a little bit back, jump a little bit back, and
593 was fall down.

Q. Did you see him jump back? A. Yes, was jump back, fall down on deck.

Q. Will you come down here and illustrate just what you saw that man do? Stand over here and tell the jury what you saw that starboard winch man do.

(The witness left the witness chair.)

A. This starboard winch man was step over here, his work.

The Court: Indicates a point in front
594 of the starboard boom.

A. Close, stay close to this winch, niggerhead.

By the Court:

Q. Close to the niggerhead? A. And after this boom go up, is jump back.

The Court: Indicating with his finger that the winchman jumped back to a posi-

tion close to the Sampson post. 595

Mr. Parmer: Yes.

A. Jumped over this side.

By Mr. Parmer:

Q. Did you see the gangway man there? A. No, I did not see.

The Court: You are talking to yourself. What was your answer? Did you see the gangway man there? Just yes or no. 596

The Witness: No.

Mr. Parmer: That is all.

The Court: All right, cross-examine.

Cross Examination by Mr. Fisch:

Q. You live in New York, don't you? A. Yes; when the ship is here, I live in New York.

Q. Your friends call you some name. What is the short name they call you when they want you? A. Walter.

Q. Walter? Fine. Now, Walter, you saw this model before you came to court, didn't you? A. 597 Yes.

Q. Where did you see it? A. Tuesday.

Q. Where? A. In office, Broadway.

By the Court:

Q. Lawyer's office? A. Yes.

Q. Lawyer's office? A. Broadway, 120.

598 *By Mr. Fisch:*

Q. Who was in the lawyer's office?

By the Court:

Q. This lawyer here? A. Yes.

The Court: Indicates Mr. Parmer.

By Mr. Fisch:

599 Q. Was the captain there? A. The captain there.

Q. The captain was there too? And you talked about where you were, how the accident happened, didn't you? A. No, I got—I gave him, just after accident, I got—they gave me to read before.

The Court: Wait a minute. Just "They gave me what I said after the accident to read before."

Q. You were there with the carpenter, weren't you, No. 3 hatch? A. Yes.

600 Q. Were all the hatches working? A. All after one o'clock, is all hatch work.

Q. All hatches working, but you stopped at No. 3 hatch, is that right? A. That is right.

Q. You and the carpenter? A. Right.

Q. And he told you, "Let's see the work." Is that right? A. Just come from forward where is our storeroom; got the back, the carpenter room, this carpenter—

201

Vladislaus V. Belochvoscicks—for Defendant—Cross.

By the Court: 601

Q. You are going back aft where the carpenter lives, is that right? A. Yes, right.

By Mr. Fisch:

Q. How long did you stay there in one place? A. I been there a couple of minutes.

Q. Why did you watch this work? A. Small hatch, smallest hatch in ship, and every time—

By the Court:

Q. Smallest on ship? A. Cargo hatch. 602

Q. Smallest cargo hatch on ship?

By Mr. Fisch:

Q. Go ahead. "And every time,"—you said—go ahead. A. Every time this hatch discharging fast out, was looking in, just how much is left there, the cargo.

The Court: "The hatchmen were discharging fast, so I looked in to see how much was left there."

603

Q. You could look at the other hatches too, couldn't you? A. Yea.

Q. But you saw the splice get caught on top, didn't you? A. Yes.

Q. That's right. And you saw the rope on the starboard side on the niggerhead wind around, didn't you? Saw that too, didn't you? A. Yes.

The Court: The answer is "Yes," Mr. Reporter.

Q. And then you saw this starboard boom go
604 up in the air? A. Yes.

Q. Then you saw this starboard boom go down? A. Yes.

Q. You were there, weren't you? A. What?

Q. You were there? A. Yes, I been there.

Q. Sure about that? A. Sure.

Q. What hatch was it? A. No. 3 hatch, bunker hatch, call him bunker hatch.

Q. With your friend the carpenter? Is that right? A. Right.

605 Mr. Fisch: That is all.

The Court: All right. You may step down.

(Witness excused.)

The Court: We will take a short recess.

(Short recess taken at this point.)

MARCUS E. ROUGH, residing at 115 Fox Boulevard, Massepequa, Long Island, N. Y., called as
606 a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Rough, what is your business? A. Steamship business.

Q. Who are you employed by? A. At the present time I am employed by War Shipping Administration.

Q. And what is your position with War Shipping Administration? A. Assistant to the Atlantic Coast Director. 607

Q. And what is your function in connection with being such assistant? What do you do? A. I have two principal jobs, one of which is managing homeward employment; the other of which is to assist the Director in administrative matters.

Q. Now, will you tell us just what homeward employment means? A. Homeward employment is all ships heading this way. It is my position to keep track of them for all divisions of the War Shipping, tell people where they are going, what is on board them, and when they will get there, and also to divert them when too many of them go to one port, divert them to other ports that can handle them. 608

Q. You do that work yourself? A. Yes, sir.

Q. What do you do in connection with these administrative matters? A. Administrative matters are matters of organization and the setup of War Shipping Administration as promulgated in all general orders and regulations, and it is my position there to deal with the agents and other divisions of War Shipping, and other agencies, and the public, as to the application of the general orders and regulations. 609

Q. And do you exercise any of the powers of the Director of the Atlantic Coast of the War Shipping Administration, Atlantic Coast Division of the War Shipping Administration? A. As I understand my position, what I do, I do in the name of the Director, and many of those things I do prior to his knowledge or without his knowledge.

Q. And he has delegated to you to exercise his authority in that respect, is that correct? A. That is right.

610 Q. Now, are you acquainted with the divisions with respect to ship operation— A. I am.

Q. —of the War Shipping Administration? A. I am.

Q. Will you tell us what the divisions are and the functions of each? A. The principal divisions, the Deputy Administrator, for ship operations has most of the operating units of War Shipping under his control.

Q. And who is he? A. That is Captain Conway, who was formerly Atlantic Coast Director up here.

Q. Stemming from him, how is it divided? A. 611 The Division of Marine Operations, Divisions of Traffic, Maintenance and Repair Division, Division of Foreign Salvage and Repair. There is a Division of Ship Warrants, I believe. I am not sure it is a division. All of those setups in War Shipping are covered by what are called administrative orders.

Q. What is your business with respect to those administrative orders? A. I do not have much to do directly with administrative orders, except that they are the thing that sets up the functions of the different departments.

Q. And are the functions of the different departments set forth in those administrative orders? 612 A. They are.

Q. Have you brought them with you? A. I have brought Administrative Order No. 50, which is the organization underneath the Assistant Deputy— the Deputy Administrator, rather, of ship operations.

Q. Does that set forth the functions of the different departments that you have described with respect to the operations of these War Shipping Administration vessels? A. It does.

Q. Have you got it here? A. Yes, sir.

Q. Will you refer to it and tell the Court and jury what the functions were of these two divisions, the Division of Operations or the marine operation section, and the Division of Maintenance and Repair. 613

Mr. Fisch: As to when?

Mr. Parmer: Well, as of the period prior to January 27, 1944.

The Court: January 27th, is that right?

Mr. Parmer: That is right. That is the date of the accident.

A. January 26th? 614

The Court: January 27th.

A. There happens to be a supplement to this order effective January 27th.

Q. Have you the original order and the supplement? A. I have here the original administrative order No. 50 and supplements 1 through 6, which are issued in sequence up to January 27, 1944.

Q. Now, can you—I don't want you to read the whole thing because it is probably too lengthy, but can you refer to that part of it and read it to us, that deals with the functions set up by the War Shipping Administration for those two divisions? A. Working backwards on this from the January date, supplement— 615

Mr. Fisch: What date?

The Witness: January, 1944.

A. (continuing) Working backwards from January 1944—

Mr. Fisch: May we not have the date?
616 What day in January?
The Witness: The date of your accident.
The Court: January 27th?
The Witness: January 27th.
The Court: All right, go ahead.

A. Supplement No. 4, issued November 13, 1943, appointed Mr. Gerald Helmbold Assistant Deputy Administrator for shipping operations, reporting directly to the associate Deputy Administrator, Grenville Conway.

617 (Contents read by the witness.)

A. (continuing) Are you interested in the repair?
Q. Yes. A. Maintenance and repair?
Q. Yes, I want to know.

Mr. Fisch: And the date.
The Court: Just the regulations which govern repairs as of January 27, 1944. Is that the information you seek to elicit?
Mr. Parmer: Yes.

By the Court:

618 Q. What were the regulations in force and effect with reference to repairs and replacements on January 27, 1944? A. Supplement No. 2 to Administrative Order 50, issued July 29, 1943, No. 1.
(Contents read by the witness.)

By Mr. Parmer:

Q. Mr. Rough, will you turn to Administrative Order—

The Court: These orders that the witness is referring to are part of Exhibit 6? 619

Mr. Parmer: Exactly.

Mr. Fisch: That is all I want to know.

The Witness: The original setup of Maintenance and Repair Division is covered by Administrative Order—

By Mr. Parmer:

Q. Order 50, Supplement 1, issued on July 29, 1943. Have you got that? A. That is the Division of Operations, July 29, 1943.

Q. Does that describe the duties and functions of the Division of Operations? A. It does. 620

Q. Have you read that yet? A. Yes, sir. Not just now, I haven't.

Q. I want you to read it to the jury. A. This is rather lengthy.

The Court: Go ahead. Read it. Take your time. Go slowly. Speak distinctly.

(Contents read to the jury by the witness.)

Q. Mr. Rough— 621

The Court: Direct his attention to such portion as you consider material.

Mr. Parmer: That is what I want to do, just to save time.

Q. I want you to read that portion of this Administrative Order No. 50, Supplement 1, which deals with marine operations section. A. Marine operations section, H. W. Jackson, Manager. (Contents read to the jury by the witness.)

Marcus E. Rough—for Defendant—Direct.

Q. Now, I want you to turn to the stevedoring section.

622

(Contents read to the jury by the witness.)

Q. Now, have you got Administrative Order No. 50, dated July 29, 1943? A. I have.

Q. Would you read that section which deals with the Division of Maintenance and Repair?

(Contents read to the jury by the witness.)

Q. And you tell us that this was in force as of
623 the time of this accident in January 7, 1944, is that correct? A. Yes.

The Court: What about No. 6, Plaintiff's Exhibit 6?

Mr. Parmer: Your Honor, this is a Maintenance and Repair regulation which was issued pursuant to the authority of the setup just shown by Administrative Order No. 50.

By Mr. Parmer:

Q. If you refer to that and others as well before
624 we get to the M. & R. regulations, I want to deal with the operating regulations. As a result of the setup on the one hand of your operating divisions or marine operation section and your M. & R., Maintenance and Repair Division, have various regulations been issued governing the activities of those principal divisions? A. Each of the divisions of War Shipping issues its regulations to the agents and for the information of the rest of War Shipping as to their method of operation and what they require.

Q. Now, have you brought with you the operating regulations? A. I have. 625

Q. Have you operating regulation 16, issued on October 8, 1942? A. Unless it's mis-filed, I haven't got it.

Q. Have you got it with you? A. I have operations 15 and 16, seem to be combined here, and the original 15 and supplement 16 are here, supplement 1 to 16 and 2.

Q. Let me see it. Maybe you have what I mean. A. What date?

Q. Issued on October 8, 1942. It is combined with operating regulation 15. A. The original one 626
is missing, Supplement 1. I am sorry about that. This is supposed to be the complete file.

Q. We will skip that and we will get that later. Have you Operation Regulation No. 20 issued on November 16, 1942? A. Yes, sir.

Q. Was that in force in January, at the time of the accident? A. It hasn't been amended or cancelled.

Q. Was it therefore in force? A. It was therefore in force.

Q. Will you read it, please? A. (The witness read the contents to the jury.)

Q. Now, will you turn to Operation Regulation 627
No. 48, issued on March 8, 1943? A. Yes, I have it.

Q. Was that in force and in effect in January at the time of the accident? A. The original operations 48 was not.

Q. Was it amended? A. Operations Regulation 48, revised, issued June 1, 1943.

Q. Very good. Will you read that one? This is 48, revised, issued on June 1, 1943, correct? A. Correct.

(Contents read to the jury by the witness.)

628

Mr. Fisch: Your Honor, may I request, I would like to get this. I didn't get this bulletin, the date, and when it was issued, and what department.

The Witness: This is Operations Regulation 48, revised, issued June 1, 1943.

Mr. Fisch: By whom?

The Witness: Signed by Mr. W. N. Westerlund.

Mr. Fisch: Who is he?

629 The Witness: Assistant Deputy Administrator for shipping operations.

By Mr. Parmer:

Q. Now, I want you to turn to Operating Regulation No. 30, issued on January 2, 1943. Tell us first whether that was in force at the time of the accident. A. Yes, sir. This is Operations Regulation No. 30, issued January 2, 1943.

Q. Will you read it, please? A. "Subject: Securing covers on cargo deep tanks."

630 Mr. Parmer: Your Honor, I have a number of regulations similar to this which I am offering for the purpose of showing that the War Shipping Administration sends instructions to general agents to turn over the War Shipping Administration instructions to the captains. They act as an intermediary for the handing on of instructions.

By Mr. Parmer:

Q. Will you read it, please? A. (Contents read to the jury by the witness.)

Q. Will you turn to Operating Regulation No. 32, issued on January 18, 1943? First, was it in force at the time of the accident? A. No, it was not. 631

Q. Was there any amendment to it, which was in force? A. Supplement No. 1 states that Operations Regulation 32, issued January 18, 1943, is hereby rescinded.

Q. When was it rescinded? A. March 25, 1943.

Q. Then skip it. Will you turn to Regulation No. 41, issued on February 12, 1943? A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was. 632

Q. Will you read just the first paragraph? A. (Contents read to the jury by the witness.)

Mr. Parmer: Now, unless you wish, Mr. Fisch, I shall not continue with reading the rest of that thing.

Mr. Fisch: You can stop now.

By Mr. Parmer:

Q. Now, Operating Regulation 42, February 16, 1943. A. That was issued January 16, 1943, and was in effect. Subject: "Safety precautions aboard merchant vessels." 633

Q. Will you read that? A. (Contents read to the jury by the witness.)

Q. Which regulation was that? A. Operations Regulation 42.

Q. Have you Operating Regulation No. 43? A. I have.

Q. Dated February 16, 1943 or— A. That is correct, February 16, 1943.

Q. Will you read the second paragraph? A. (Contents read to the jury by the witness.)

Q. Now, will you turn to Operating Regulation
634 46, issued on March 4, 1943? A. I have it.

Q. Was that in force at the time of the accident? A. Yes, sir, it was.

Q. Would you read it, please? A. (Contents read to the jury by the witness.)

Q. Now, will you turn to Operating Regulation 50, issued on March 10, 1943? A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was, and as amended by two supplements issued in between.

Q. Now, will you read this second paragraph of the original regulation of March 10, 1943?

635

Mr. Fisch: Your Honor, he says there were supplements issued which amended the original in between. Does he mean before the accident? If it was before the accident, then the supplements should be read and not the original which is amended.

Mr. Parmer: The supplements are in the nature of additions, Mr. Fisch.

Mr. Fisch: But if they change the original—supposing you ask this witness that. If he says no, all right.

The Witness: There is nothing in the two
636 supplements issued that affects this particular paragraph.

By Mr. Parmer:

Q. Will you read that? A. (Contents read to the jury by the witness.)

Q. That is enough. Operating Regulation No. 51 on March 31st and April 2, 1943. I have a double date on that. A. 51?

Q. Yes. A. Operations Regulation 51 is issued December 21, 1943. 637

Q. That is 51, Supplement 2, isn't it? A. Yes, 51 is March 31st.

Q. Would you read the last paragraph? Was it in force at the time of the accident or was it changed by any of the supplements that you refer to? A. It is amended somewhat by Supplement 2.

Q. Will you read it in its amended form, the corresponding portion? A. The subject of this regulation is the pollution of navigable waters of the United States.

Q. Yes. What is the general agent told to do with respect to that? A. (Contents read to the jury by the witness.) 638

Q. Now, will you turn to Operating Regulation No. 52, dated April 22, 1943? A. I have it.

Q. Was that in force at the time of the accident? A. It was.

Q. Will you read that portion of it which directs the general agent to do something? A. "General agents are therefore directed to instruct Masters of all vessels under control of the War Shipping Administration to keep shaft alley doors closed at all times, except when it becomes necessary to fill bearing reservoirs or to make repairs." 639

Q. Will you turn to Operation Regulation No. 51, issued on May 3, 1943? A. What number was that, sir?

Q. 54. I am sorry. A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was.

Q. Will you read that portion of it which directs the general agent to do something? A. (Read to the jury by the witness, beginning with the words "Complaints have been received.")

Q. Operating Regulation 55, issued on May 10,
640 1943. A. I have it.

Q. Was that in force at the time of the accident? A. It was.

Q. Will you read that portion which instructs the general agent to do something? A. (Contents read to the jury by the witness.)

Q. Will you read the rider? A. (Contents read to the jury by the witness.)

Q. Will you turn to Operations regulation 56, dated May 12, 1943? A. Yes, sir.

641 The Court: Ladies and gentlemen of the jury, at this point we will adjourn until tomorrow at 10 o'clock. Do not discuss the case among yourselves. Do not permit anybody to discuss it with you. Do not visit the scene of the accident. Ten o'clock tomorrow morning.

(Whereupon an adjournment was taken to Friday, June 8, 1945, at 10 A. M.)

642

Friday, June 8, 1945

TRIAL RESUMED

(Same appearances)

MARCUS E. ROUGH, resumed the stand and testified further as follows: 643

Direct Examination by Mr. Parmer:

Q. Mr. Rough, have you brought with you this morning Operation Regulations 15 and 16, which you didn't have yesterday? A. I have.

Q. Will you turn to Operation Regulation 16, issued on October 8, 1942, and, as we did before, will you tell us whether it was in force as of the day of the accident? A. Operations Regulation 16 is issued on October 12, 1942, and attaches a directive to all agents, dated October 8, 1942. 644

Q. Was it in force at the time of the accident? A. It was.

Q. I wish you to read from the directive, second numbered paragraph. Read it so that everybody can hear it, please. A. (Contents read to the jury by the witness.)

Q. Now, will you turn to Operating Regulation No. 15, please? A. Operations Regulation No. 15, dated October 10, 1942, subject of discipline aboard vessels owned by or chartered to the War Shipping Administration.

Q. Was that in force at the time of the accident? 645
A. It was.

Q. Will you read the first five paragraphs of Directive No. 1 attached to that, please? A. (Read to the jury by the witness.)

Q. Now, will you turn to Operating Regulation No. 56, dated May 12, 1943? A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was.

Q. Will you read the first paragraph of it which deals with the instructions to the general agent? A. (Read to the jury by the witness.)

Q. Now, Operating Regulation 58, dated May
646 28, 1943. A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was, as amended by Supplement 1, issued September 18, 1944.

Q. Well, September 18, 1944, would be after the accident, wouldn't it? A. That is right.

Q. The one that was in force at the time of the accident would be this, the original? A. The original.

Q. Now, what is the subject of that regulation? A. "Status of military and naval personnel assigned for duty aboard War Shipping Administra-
647 tion vessels during period when the vessels are not assigned or wholly employed by the Army or Navy."

Q. Now, will you read the last paragraph of that? That is on page 2. A. (Same read to the jury by the witness.)

Q. Now, Operating Regulation 59, dated May 31, 1943? A. Yes, sir.

Q. Was that in force at the time of the accident? A. 59?

Q. Yes. May 31st. A. Yes, sir.

Q. Did you say it was in force at the time of the
648 accident? A. The accident was—

Q. —January 27, 1944. A. Supplement 1, dated January 12th.

Q. Does that take its place or is it in addition thereto? A. No, sir. Supplement 1 only extends the provisions of the original regulation to ferryboats and small craft.

Q. Turning to the original regulation,— A. Yes, sir.

Q. Would you read that, please? A. (Contents read to the jury by the witness.)

Q. Operating Regulation No. 62, dated June 9, 1943. Have you got it? A. Yes. 649

Q. Was that in effect at the time of the accident? A. It was.

Q. Will you read that, please, in full? A. (Contents read to the jury by the witness.)

Q. Operating Regulation No. 63, dated June 23, 1943? A. Yes, sir.

Q. I believe the revision of that was in 1944, June? A. It was revised June 27, 1944.

Q. —Which was after the accident; so was this one, June 23, 1943, in force at the time of the accident? A. It was. 650

Q. What is the subject of that? A. The subject is, "Crews Employment of staff officers."

Q. Will you read the second paragraph, please? A. (Read to the jury by the witness.)

Q. Next paragraph, please? A. (Read to the jury by the witness.)

Q. The next two paragraphs, please? A. (Read to the jury by the witness.)

Q. July 2, 1943, Operating Regulation No. 65. Was that in force at the time of the accident? A. That one was. It has subsequently been cancelled and I do not have the cancelled one with me.

Q. When was it cancelled? A. January 6, 1945. 651

Q. It was in existence in 1944? A. It was in existence and in effect then, but it was withdrawn from here when it was cancelled.

Q. Is this the original which I hand you? A. Yes, sir.

Q. Will you read the first, second, and last paragraphs—not the first, second, but the second, third, and last, please? A. (Same read to the jury by the witness.)

Q. Regulation No. 75, November 2, 1943, please?

A. That is a similar case to the last one. I do not
652 have the original which has been supplemented in 1944.

Q. Do you know what date it was supplemented in 1944? A. June 2nd.

Q. So this one was in effect as of the day of the accident? A. Yes, sir.

Q. I hand you this paper. Is this the operations regulations? A. It is.

Q. What is the subject? A. "Information required and procedure for payment of wages, etc., when ship's papers are lost."

Q. Will you read these four paragraphs that I
653 point out here?

(Read to the jury by the witness, commencing with the words, "In the event any vessel owned by or bare boat chartered to the War Shipping Administration is lost."

Q. Operating Regulation 76, November 6, 1943. A. Yes, sir.

Q. Do you have that? A. Yes, sir.

Q. Was that in force as of the time of the accident? A. Yes, it was.

Q. What is the subject of that? A. "Prisoners of war."

Q. Will you just read that paragraph which deals
654 with what the general agent or agents are supposed to do? That is the first paragraph. A. (Read to the jury by the witness.)

Q. That is all for that. Operations Regulation 78, dated November 17, 1943. A. Yes, sir.

Q. Was that in force as of the time of the accident? A. It was.

Q. What is the subject of that? A. "Payment of repatriation wages to crew members after return to port of shipment."

Q. Will you read the last paragraph, beginning at the bottom of page 1? A. (Read to the jury by the witness.) 655

Q. Operations Regulation 79, dated November 25, 1943. A. Yes, sir.

Q. Was that in force as of the time of the accident? A. It was.

Q. What is the subject of it, please? A. "Certificates of loading explosives or other dangerous cargo."

Q. Will you read the first and third paragraphs? A. (Read to the jury by the witness.)

Q. Operations Regulation 81, December 4, 1943. 656
A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was.

Q. What is the subject? A. "Convoy conferences."

Q. Will you read the first three paragraphs? A. (Read to the jury by the witness.)

Q. Now Operations Regulation 82, December 8, 1943? A. Yes, sir.

Q. Was that in force as of the date of the accident? A. Yes, sir.

Q. What is the subject? A. "Crews. Use of merchant radio operators to replace United States 657
Naval radio man."

Q. Will you read the second paragraph? A. (Read to the jury by the witness.)

Q. Now, will you read the next to the last paragraph on the same page? A. (Read to the jury by the witness.)

Q. Now, the next paragraph, please? A. (Read to the jury by the witness.)

Q. Now, Operations Regulation No. 83, December 11, 1943. A. Yes, sir.

Q. Was that in force at the time of the accident?
658 A. It was.

Q. What is the subject? A. "Bunker fuel oil, measurement of quantities, bunkered or discharged."

Q. Just read the first paragraph, please. A. (Read to the jury by the witness.)

Q. Would you turn to Operations Regulation No. 1, dated July 13, 1942, please? A. Yes, sir.

Q. Was that in force at the time of the accident? A. Dated when, sir?

Q. July 13, 1943. A. I have Operations Regulation No. 1, dated May 25, 1942.

659 Q. Was that a revision? A. It does not indicate so. I have no prior copy.

Q. That is the one I refer to. Was that in force at the time of the accident? A. Yes, sir.

Q. What was the date of it? A. May 25, 1942.

Q. I want you to read the last paragraph. What is the subject of it? A. "Policy with respect to seagoing personnel."

Q. What is the last paragraph there? A. (Read to the jury by the witness.)

Q. Now, will you read the first page of this statement on policy, please? A. (Contents read to the
660 jury by the witness.)

Q. Now, will you turn to the next page, which deals with wages and working conditions and discipline? A. Yes, sir.

Q. Will you read that, please? A. (Contents read to the jury by the witness.)

Q. Who was that signed by? A. That is signed on behalf of the National Organization of Masters, Mates and Pilots of America, James J. Delaney; on behalf of the National Marine Engineers Beneficial Association, S. J. Hogan.

Q. Yes? A. For the War Shipping Administration, by Admiral E. S. Land and Edward McCall, 661
and William Radner.

Q. Now, were similar statements of policy put into effect with respect to the employment of the subordinate members of the crew? A. Yes, sir.

Q. Such as the seamen and the men who work in the engine room, the men who work in the galley? A. The second statement hereunder, reading the same, is signed by E. S. Land, Edward McCall, for the War Shipping Administration, by Harry Landburg, Secretary-Treasurer, Sailors' Union of the Pacific and President, Sailors' International Union; John Hawk, Secretary-Treasurer, Atlantic 662
and Gulf District Seafarers' International Union; V. J. Maloney, Secretary, Pacific Coast Marine Firemen's, Oilers' and Water Tenders' Association; and James W. Dork, Secretary, Marine Cooks and Stewards Association, signed in Washington, May 4, 1942.

Q. Have you Operation Regulations No. 2, revised as of August 21, 1942? A. Operations Regulations No. 2, revised as of August 21, 1942. "Vessel casualties."

Q. Was that in force at the time of the accident? A. Yes, sir. 663

Mr. Parmer: I see nothing particularly significant there. I withdraw it.

Q. Will you turn to Operation Regulation No. 4, dated June 22, 1942? A. Yes, sir.

Q. Was that modified by a supplement No. 1, dated July 12, 1943? A. Yes, sir.

Q. What was the subject of both regulations? A. "Employment of officers and crews on new ships."

Q. Will you read the modification as of July 12,
664 1943? A. "Effective as of this date, Operation Regulation No. 4, dated June 12, 1944, is hereby cancelled."

Q. 1942. A. 1942, excuse me. "In the future, the advance assignment of personnel to newly constructed vessels will be made by general agents in accordance with a letter of instructions from the manager marine operations, War Shipping Administration, to be issued in each case."

Q. And do you know that that is the practice in each case?— A. Yes, sir.

Q. —Or was at that time? Did you issue a let-
665 ter of instruction in each case? A. Yes.

Q. Operation Regulation No. 6, August 20, 1942. A. Yes, sir.

Q. Was that in force at the time of the accident? A. As amended by Supplement 1, August 24, 1942.

Q. Well, referring to that, what is the subject of that? A. "Degaussing information and instructions for merchant vessels."

By the Court:

Q. Tell the jury what degaussing is. A. Degaussing is a method developed early in the war.

666 Q. Protection against submarines? A. Neutralizing the magnetic effect of magnetic mines.

By Mr. Parmer:

Q. Will you read Regulation No. 6, the original one issued on August 20, 1942; that is, the last paragraph?

(Read to the jury by the witness.)

Q. Operation Regulation No. 9, Supplement 1, December 29, 1942. A. December 29, 1942, is Supplement 1. 667

Q. Operation Regulation No. 9, Supplement 1, was that in force at the time of the accident? A. It was.

Q. Will you read that, please? A. (Contents read to the jury by the witness.)

Q. Now, Operations Regulation No. 12, September 12, 1942. A. I have a typewritten substitute copy of it. Do you have the original?

Q. Let us see if that is the same. A. Yes, sir.

Q. Was that in force at the time of the accident? A. Yes, sir. 668

Q. What does that deal with? A. "Cleaning cargo holds in preparation for cargo, scaling, painting, and cleaning boilers and bilges."

Q. Will you read it? A. (Contents read to the jury by the witness.)

Q. Operation Regulation No. 13, dated October 7, 1942. A. I am sorry that one is missing.

Q. I hand this to you. A. Yes, sir.

Q. Was that in force at the time of the accident? A. I don't have any existing supplement that would cancel it.

Q. Does that mean it was in force? A. I believe so. 669

Q. What is the subject of that? A. "Slop Chest."

Q. What does that mean? A. That is, the slop chest is the crew's commissary for cigarettes and clothing, miscellaneous equipment.

Q. What is the general agent directed to do with respect to that?

(Read to the jury by the witness.)

Q. Have you got with you General Order No. 12,
670 revised? A. Yes, sir.

Q. Skip it. I note it's dated May 27, 1944, which is after the date of the accident. Now, do you have Maintenance and Repair Regulation No. 3? A. I don't have the Maintenance and Repair regulations with me.

Q. Do you recognize it, when I show it to you?

Mr. Fisch: Mr. Parmer, what is the date of that, please?

Mr. Parmer: I will give you the date, November 15, 1943.

671

A. Yes, sir. That is signed by hand on the stencil by R. T. Lemon, Director of the Maintenance and Repair Division.

Q. Was that in force at the time of the accident in January, 1944? A. Without the files here, I wouldn't know whether there was a supplement issued. I would believe so.

Q. Subject to proof to the contrary—

Mr. Fisch: Your Honor, we must object to any of this. Without the file, he wouldn't know whether there was any supplement
672 issued. Under those circumstances, we do not know whether this is in effect.

Mr. Parmer: We have a supplement which takes care of it.

Mr. Fisch: All right.

The Court: Objection withdrawn.

By Mr. Parmer:

Q. I show you supplement issued on December 4, 1943. A. Yes, sir.

Q. Is that a supplement, Maintenance and Repair regulation No. 3, which I showed you previously? A. Yes, sir. 673

Q. Does it change it in any respect? Is it a modification or an addition? A. It appears to add further information for the guidance of the general agents, including the terms of repair contracts.

Q. That is, it's an addition? A. An addition.

Q. Now, will you just read—tell us what the subject of this thing is, and then read paragraphs A, B and C.

(Contents read to the jury by the witness.) 674

Mr. Fisch: May we have that, please? Have you a copy of that?

Mr. Parmer: You can have that.

By Mr. Parmer:

Q. Mr. Rough, in addititon to the written regullations and orders, some of which you laboriously read, are oral instructions given from time to time by the War Shipping Administration to the general agents? A. Constantly.

Q. And who in the War Shipping Administration gives such orders to the general agents, oral orders? A. In accordance with the organization, the prime authority, of course, would be the District Director under whom the heads of the different divisions and persons designated by them will call the agents on the telephone and speak to them personally and give them orders which may or may not coincide with the written orders. 675

Q. You mean to say that these written orders from which you have read are subject to change from time to time by oral instructions? A. Yes, sir.

676 Q. Is there any way of knowing what the instructions of the general agents are at any particular time in view of the practice of giving them oral instructions which may contradict the written? A. The written regulations such as oper. ting regulations, which are the regulations of the ship operations divisions, are always subject to amendment or change by the person who wrote them, and they may supplement it for general distribution or they may directly advise an agent to do to the contrary in a particular case that happens to warrant particular attention.

677 Q. Do these practices of the War Shipping Administration, as enforced with general agents, vary from district to district by reason of that fact? A. In some respects, they may. They do, in some respects. For the most part, operations regulations emanating from Washington are not countermanded by District Directors without very good and extraordinary reason.

Q. Now, who is in your organization who has the power or the authority to complain to the general agent that he is not living up to his contractual agreement? A. Such complaints would emanate with respect to different departments of the operation with the managers of those departments. In
678 connection with the matters that I have been reading from the operation regulations, those complaints would originate with the Manager of Marine Operations, in connection with operations, and the Marine Superintendent in connection with crew matters.

Q. And who has the supervisory capacity over all of these managers of the various departments? A. In the Atlantic Coast district, it's Captain Hewlet Bishop, Atlantic Coast Director.

Q. What relation do you bear to him? A. I am his assistant. My title is Assistant to the Atlantic Coast Director. 679

Q. Do you in that capacity exercise his authority in dealing with the general agents and objecting when they are not toeing the mark, so far as their contractual obligations are concerned? A. I do.

Q. On behalf of the United States, do you pass on the matter of whether they do or do not perform their contractual obligations? A. I do, not in all matters. I wouldn't, for instance, step in to the matters on which we have a Manager of Marine Operations, when he is available to handle his own work; but there are many phases of the general agency agreement which are not strictly operations and require a department to run. 680

Q. Now, are you familiar with this GAA agreement? A. Yes, sir.

Q. I call your attention to the—

Mr. Fisch: 326.

Mr. Parmer: Thank you.

Q. I call your attention to Article 3A, sub A. A. I would rather read it from here, which is the official copy.

Q. Very good. I want to read just that section. Then I want to ask a question. 681

(Read to the jury by the witness.)

Q. You know what that means? A. Yes, sir.

Q. It refers to a vessel that has been chartered to you on a bare boat basis? A. That does refer to a vessel which we charter on a bare boat basis.

Q. Just read that Subdivision A. A. The preamble to this paragraph is:

(Contents read to the jury by the wit-
682 ness.)

Q. Do you define from time to time for the benefit of general agents what "reasonable commercial practices" are? A. In a manner of speaking, we define it. If the agent does something not covered by a regulation, which we don't think is good commercial practice, we will tell him so and overrule him, tell him to do otherwise.

Q. That is your function, is it? A. Yes, sir, and the functions of the different departments.

Q. I want to know, is your function on behalf
683 of the United States to so define commercial practices for the benefit of the general agent? A. Yes, sir.

Q. And how much experience have you had in the shipping business before you went with the W.S.A.? A. About 16 years before I went with War Shipping. I have been with War Shipping for two and a half years.

Q. What was your experience in the commercial world? A. In 1927 I started with the old Munson Line. I was with McCormack Steamship Company when Munson and McCormack parted com-
684 pany on joint services, and then I was with the Weyerhouser Steamship Company, Pacific Coast, direct line for the manager part of that time, principally engaged in fruit traffic work; government regulation solicitation, including one year, 1941, spent working on the piers as assistant superintendent, plant clerk.

Q. Are you acquainted with the practice on Merchant ships of the master or the chief engineer and the stewards, chief steward, preparing requisitions on repairs which are turned in at the close of a

voyage? A. Yes, sir. I have never worked in a marine operations department. 685

Q. But are you acquainted with that commercial practice? A. Yes, sir.

Q. Is that one of the reasonable commercial practices approved by the Government in the operation of its ships? A. It is a practice continued that, at the termination of a voyage, the chief officer, chief engineer, file requisitions and reports on repairs that are necessary.

Q. Is that approved by the W.S.A. for the operation of their ships? A. Yes, sir. I believe it is required. 686

Mr. Fisch: Does he know that himself? He is not in that department even.

Mr. Parmer: He says he is acquainted with the practice and he says it is approved.

A. As a matter of fact, I believe I haven't the repair regulations with me, but I believe it's required by one of the repair regulations, that the agent shall obtain a list of repairs from ship's officers.

Q. Now, assuming that the agent obtains such requisitions for repairs at the close of a voyage from the ship's personnel and arranges for the performance of the repairs so required, is that acceptable performance—Is that performance of the contract, the GAA contract, acceptable to the United States as full performance of the contractual obligation? 687

Mr. Fisch: Just a moment, please. That is a matter of law, your Honor pleases. We object to having this witness interpret cer-

tain provisions of contracts, and so forth.

688 The Court: Sustained.

Mr. Parmer: That is all, Mr. Rough.

Mr. Fisch: May we have from Mr. Parmer, I want Regulation, Operation Regulation 48, revised, issued June 1, 1943, signed by W. N. Westerlund.

Mr. Jorda: It is Exhibit 6.

Mr. Fisch: You have it over there.

Mr. Parmer: He has it here. He will produce it for you.

The Witness: I have it.

689 The Court: He has it, Mr. Fisch.

The Witness: 48.

Cross Examination by Mr. Fisch:

Q. 48, revised, Operator's Regulation 48 revised, and issued June 1, 1943, signed by Westerlund. A. Correct, I have it.

Q. Let me have it, please. I will give it back to you before you leave. I won't be very long. Mr. Rough, you have read a great many regulations issued by some part or some department of the United States Government, is that correct? A. Yes, sir.

690 Q. Now, what department are you in? A. I am not in one of the organization departments. I am assistant to the Director; in other words, I am in a field capacity. The Director is over all departments in his district.

Q. The Director of what? What is his name? A. Captain Bishop, he is the Director of the Atlantic Coast district. That includes everything from Halifax to Jacksonville.

Q. You have for a considerable length of time

read these regulations and you are referring to general agents? A. Yes, sir. 691

Q. Were you referring to these agents mentioned in the general agency agreement, GAA 4-42? A. Yes, sir.

Q. And when you read these rules and regulations saying "The general agent shall" and "The general agent shall do this," you were referring to the person or the corporation in that agreement, were you not? A. Yes, sir.

Q. Now, when you mentioned the general agent shall hire certain persons for the boat,— A. Yes, sir.

692

Q. —did that refer to any particular part of the country? A. Part of the country?

Q. Yes, any particular portion of the globe? A. I don't quite understand.

Q. Well, I will withdraw that. That general agency agreement covers the contract that the agent has with the Government concerning the boat under the jurisdiction of the agent. Is that correct? A. That is correct. The vessel is assigned to the agent and he is the agent thereon as long as the War Shipping leaves it under his agency, anywhere the vessel may be located.

Q. And when these rules and regulations were issued that there was a breakdown of discipline, the general agent was instructed to do something about it, so far as the master or the captain of the ship was concerned; is that correct? A. Yes, sir. 693

Q. All these things were done through the general agent? A. Yes, sir. They are the War Shipping's agents of the vessel.

Q. It was found, was it not, that after these contracts were issued there were things that developed that needed further attention, is that correct? A. Yes, sure.

Q. And those things that needed attention and
694 had to be taken care of, like discipline, hiring additional crew, supplying a master and members of the crew, were things that were given to the agent to carry out?

Mr. Parmer: Your Honor—
The Court: Overruled.

Q. And your answer?

By the Court:

695 Q. Do you know whether that is a fact or not? A. The regulations that were issued were given to the agents to carry out. That is correct.

By Mr. Fisch:

Q. Now, when you testified that all vessels under the jurisdiction of a general agent, the general agents are instructed— A. I don't think I used the word, "jurisdiction."

Q. You did. A. No.

Q. You did. I have got it marked here. Assuming that you did, you were referring—were you re-
696 ferring to any particular part of the United States or were you referring to some place on the continent? A. In the wording of these—

Mr. Parmer: Your Honor, I object to that. The man was not referring to anything himself. He was reading from regulations—

The Court: Sustained as to form.

Mr. Parmer: —made by others.

Q. You are the assistant to the overall operation? A. On the Atlantic Coast. 697

Q. Do you know what these regulations refer to? Do they refer to the United States? A. These regulations are all issued in Washington and apply to all agents wherever located on ships, wherever located.

Q. That is what I wanted to know.

Mr. Fisch: That is all.

Redirect Examination by Mr. Parmer:

Q. Now, Mr. Rough, you were asked a question whether these regulations, as to the application of these regulations, and you answered they applied to ships wherever located. A. Yes, sir. 698

Q. Do you mean by that that some of these, all of these things mentioned in these regulations, can be physically performed while the vessels are at sea? A. Well, the physical application of each regulation would have to be, of course, obvious on its face. If it requires the agent to do something in port, why, the vessel would have to be there.

Q. Yes.

Mr. Fisch: That is all. 699

The Court: You may step down, sir.

(Witness excused.)

700 NICHOLAS J. POLIKNICK, residing at 34 Dartmouth Road, West Orange, New Jersey, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer:

Q. What is your business, sir? A. Stevedoring and tunnel operators.

Q. With what company? A. With the Jarka Corporation.

Q. And what position do you occupy? A. District Operating Manager.

701 Q. Did you at our request bring here your contracts?— A. Yes, sir.

Q. —for the stevedoring that was done on the Steamship Everagra? A. Yes, sir.

Q. —On January 27, 1944? A. Yes, sir.

Q. Your company did the stevedoring at that time? A. That is correct.

Q. Will you produce that contract, please?

The Court: He has it right in front of him. Show it to counsel.

Mr. Parmer: I offer this in evidence.

702 Mr. Fisch: Let me look at that first.

Mr. Parmer: Surely.

Instead of keeping that here, we have a facsimile of it here in the book, which we can offer in evidence, and we can save time.

Your Honor, we are going to offer this in evidence and we are going to get a copy of it so that we don't have to hold the man's record.

The Court: Offer it in evidence. No objection, with the right to withdraw same and substitute therefor a copy.

(Received in evidence and marked Defendant's Exhibit T.) 703

(Portions of Exhibit T were read to the jury by counsel.)

The Court: Do you wish the witness on the stand any longer?

Mr. Parmer: I wanted to ask him one more question.

By Mr. Parmer:

Q. Does the Jarka Corporation do the stevedoring at Pier 34? A. Yes, sir. 704

Q. And who has that pier? A. The Agwi Line.

Q. And you are regular stevedores for them? A. At 34, yes, sir.

Q. And do you know which agent, if any, of the United States asked you to do this work at the time on the Everagra? A. Well, I am not prepared to say that, although I do know that.

Mr. Fisch: We object.

Q. If you don't know,— A. That is correct. I don't know. 705

Q. Then I don't want you to say. A. I don't know.

Q. Very good. And your men, that is, the men employed by you to do this work, came on board the Everagra pursuant to this contract with the United States, is that correct? A. That is correct.

The Court: Any questions, Mr. Fisch?

Mr. Fisch: No.

(Witness excused.)

706

(A recess was declared, following which the trial was resumed.)

JOHN O'ROURKE, residing at 973 East 32nd Street, Brooklyn, N. Y., called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

707 *Direct Examination by Mr. Parmer:*

Q. What is your business, Mr. O'Rourke? A. Steamship business.

Q. And by whom are you employed? A. Moore & McCormack Lines.

Q. What is your work for them or your position? A. Superintendent of terminals.

Q. Now, is your company an agent— A. Yes, sir.

Q. —for the United States? A. Yes, sir.

Q. That is, the War Shipping Administration? A. Yes.

708 Q. —Called a berth agent? A. GAA agents on some ships and berth sub-agents is the term on others.

Q. You have two kinds of contracts? A. Yes.

Q. One, the berth agent's contract and also a general agency contract? A. Yes, sir.

Q. Now, did your company act as berth agents with respect to the Steamship Everagra on January 27, 1944? A. Yes, sir.

Q. And what did you do in that respect? A. We made arrangements with the Agwi Lines to

berth the vessel at Agwi Pier 34 for the purpose of discharging the cargo. 709

Q. When did you make that arrangement? A. January 17, 1944.

Q. Did you do that by means of a conversation followed up by a confirmatory letter? A. Yes, sir.

Q. Have you got the confirmatory letter in your hands? A. Yes, sir.

Q. May I have it, please? A. Yes, sir.

Q. This is the copy of the letter that you sent to Agwi Lines with respect to the berthing of the vessel? A. Yes, sir. 710

Mr. Parmer: I offer it in evidence.

Mr. Fisch: No objection.

(Letter received in evidence and marked Defendant's Exhibit U.)

By Mr. Parmer:

Q. Mr. O'Rourke, did your company make the arrangements with the Jark Company for doing the stevedoring or did you instruct the Agwi Lines to do it for you? A. We instructed the Agwi Lines, inasmuch as the Jarka Corporation did all the work on that particular pier. 711

Q. Would you want to take this letter back with you and keep it in your files? We can read it into the record. A. It won't make any difference.

The Court: Let it stay here.

Mr. Parmer: That is all.

Cross Examination by Mr. Fisch:

Q. Mr. O'Rourke, I just have one question. Mr.

O'Rourke, berthing a boat simply means giving it
712 space alongside the pier, isn't that so? A. Giving —alongside and discharging on to the pier, yes, sir.

Mr. Fisch: That is all.

Redirect Examination by Mr. Parmer:

Q. Aren't you required, pursuant to your berthing contract, to arrange for the discharge of the vessel as well? A. Oh, yes.

713 *By the Court:*

Q. Discharge the cargo? A. Discharge the cargo.

By Mr. Parmer:

Q. Discharge of the cargo? A. Yes.

Q. The vessel comes alongside the pier for the purpose of having work carried out on it, that is, discharging its cargo? A. That is right.

Q. You handle that for the United States? A. That's right.

714 The Court: All right, you may step down. Call your next witness.

(Witness excused.)

ANDREW S. VARNI, residing at 54 Copley Avenue, Teaneck, N. J., called as a witness in behalf of 715
the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Varni, what is your work? What do you work at? A. I am a surveyor for the United States Salvage Association.

Q. And what is the U. S. Salvage Association? A. U. S. Salvage Association, marine surveyor for the underwriters.

716

Q. For hull underwriters? A. For the hull underwriters.

Q. Will you explain what that means to the jury? A. Well, whenever any damages or anything, any kind of damage occurs on ships, the U. S. Salvage is notified, who represents the marine underwriters, to appoint a surveyor to come down and ascertain the nature and extent of the damage, and agree on the cost of the repairs.

Q. Do you do that in the ordinary course in connection with all damages on vessels? A. Yes, sir.

Q. And did you in the course of that employment go on board the Steamship Everagra to examine damage to a boom which had occurred on January 27, 1944? A. Yes, sir. 717

Q. When did you go on board the ship? A. I was on board the ship on January 28, 1944.

Q. Did you examine the boom at that time? A. Yes, sir.

Q. That is, the broken parts? A. Yes, sir.

Q. What did you find? A. Found that there was a boom on the No. 3 hatch, that wooden boom that was broken right close to the heel of the boom on

the starboard side. The boom was broken off in
718 two pieces. One piece was lying down on the deck and the other piece was still in the saddle of the boom, on the king post.

Q. What did you observe with respect to the condition of the wood at the broken ends? A. The wood was in very good condition, and that is with respect to the wood, but there is also on the end of this boom, there is what we call a gooseneck or a king pin, which holds it into the king post, and that pin, which was a steel pin, was slightly bent.

Q. Are you acquainted from your experience with
719 the nature of wood which is in good condition and wood which is in bad condition? A. Yes, sir. I have been surveying damaged vessels for the U. S. Salvage for the last 18 years.

Q. Have you run across instances where wood was in bad condition and appliances had to be condemned? A. Great many cases.

Q. And are you able to tell wood which is good from wood which is bad? A. I think I am, sir.

Q. Have you got those exhibits handy? Now, Mr. Varni, you did not go down there to examine this wood in connection with the accident case of anybody here? A. No, sir. I was there to ascertain
720 the nature and extent of the damage and agree on the cost of the repairs. That is my purpose.

Q. These Exhibits K-1 and K-2, do you recognize that as the— A. That is the boom that I seen broken on the day of my survey.

Q. Will you look at the wood, particularly at the ends where it broke off, and tell us whether that wood is in good condition or bad condition, or what condition it is in? A. I would say that the wood is in very good condition.

Mr. Parmer: That is all.

The Court: Cross-examine. 721

Cross Examination by Mr. Fisch:

Q. You have been a witness before, have you not, on previous cases? A. Yes, sir.

Q. During what period of years? A. Eighteen years.

Q. That means as a witness. When I say as a witness, I mean you have testified in court proceedings before? A. Yes, sir.

Q. And you were making this survey for the U. S. Salvage Corporation, is that correct? A. Right. 722

Mr. Parmer: Association.

Mr. Fisch: Association?

Q. What connection have they with this ship? A. The—I don't know what connection they have with the ship, but we represent the underwriters for the War Shipping Administration; survey was made in behalf of the War Shipping Administration.

Q. Underwriters for what? A. That I don't know. I am sent there by the U. S. Salvage, and I do not know what their relation— 723

By the Court:

Q. Relationship to the War Shipping Administration is, is that right? A. That's right, your Honor.

Andrew S. Varni—for Defendant—Cross.

By Mr. Fisch:

724 Q. Do you know why you were on the ship, for what purpose? A. I was sent there to ascertain the nature and extent of this damaged broken boom and to agree on the cost of the repairs.

Q. The nature and the extent? A. Right.

Q. So that the damage could be made good, is that right? A. In order to place the vessel back in the same condition it was before the accident.

Q. How were you interested in seeing the nature of the wood, whether it's good or bad, if the dam-
725 age was to be repaired? A. We have to find out what the cause of the damage is, how this thing was broken, was it broken by wear and tear, or is it a damage? One of our principal functions is to ascertain whether it's wear and tear or whether it's damage. There is a big distinction in the survey to be made when it's due to wear and tear and when it's due to damage. If it is due to wear and tear, then it is our function to say so.

Q. Did you say you were not there in connection with any accident case? Did you mention that previously? A. I said I was there in connection with this accident, the boom that was broken in
726 connection with this accident.

By the Court:

Q. But you said you were not there in connection with any personal injuries. That is what the lawyer means? A. No, sir.

Mr. Fisch: That is all.

Redirect Examination by Mr. Parmer:

727

Q. Did you observe any powdery condition of the wood at the time that you examined it? A. No, sir.

Q. Did you render a report in which you made any determination as to whether this was damaged or—

Mr. Fisch: Just a minute. We object whether he rendered a report in which he said certain things.

The Court: Overruled. I will permit you to say if you rendered a report.

728

Q. Did you render a report which determined whether it was damaged, on the one hand—

Mr. Fisch: Now, he is adding something.

The Court: I will sustain the objection in that form. I will permit you to answer the question whether you rendered a report.

The Witness: Yes, sir, a report is rendered.

By Mr. Parmer:

729

Q. To whom did you render the report? A. War Shipping Administration.

Mr. Parmer: That is all.

Mr. Fisch: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Is that your case, with the exception of the medical?.

Mr. Parmer: That is my case with the exception of medical. Perhaps we can agree. I want to agree on the date of our GAA agreement. I have it here.

Mr. Fisch: Yes. Let us look at it.

Mr. Parmer: Your Honor, I think it will be—

The Court: It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the date of the GAA agreement—

Mr. Parmer: —that the date of the allocation of the Steamship Everagra to the defendants pursuant to the GAA agreement was May 26, 1943.

Mr. Fisch: The contract is dated March 1, 1943.

Mr. Parmer: Yes, but the vessel was not allocated until May.

The Court: All right. That is the stipulation then. The contract date, March 1st, vessel allocated May 26, 1943.

Mr. Parmer: With the exception of medical—

The Court: Have you considered that question of withdrawing the exhibit?

Mr. Parmer: I have determined to withdraw that exhibit, but I do not know the number of it.

Mr. Fisch: Which one was that?

Mr. Parmer: It is M. & R. regulation.

The Court: The only exhibit that you objected to, Mr. Fisch, as I recall it.

Mr. Parmer: Yes, it's Exhibit M, which

was issued on December 15, 1944, effective January 15, 1945, by reason of the fact that it was issued after the time of this accident, and its relevancy is questionable. 733

The Court: Do you know the exhibit counsel is referring to, Mr. Fisch? He spoke of the codified regulations.

Mr. Fisch: I remember there was one objection I made.

The Court: There it is. It is withdrawn.

Mr. Fisch: Fine.

The Court: The defendant rests, with the exception of his medical. 734

VINCENT RUSSO, recalled, as a witness in behalf of the plaintiff, in rebuttal, testified further as follows:

Direct Examination by Mr. Fisch:

Q. Mr. Russo, there was testimony given in court yesterday by two witnesses who were members of the crew of the Everagra. One stated that he was a carpenter and the other an A.B. (Able Seaman). Did you see them in court? Were you here when they testified? A. I was. 735

Q. Now, they stated that they were standing right near the hatch where the work was done for twenty minutes before the accident. Did you see them there at all? A. Well, I had just come up on deck there.

Q. Answer the question. Did you see them there before the accident? A. No, sir.

736 Q. Did you see any of them after the accident? A. I did.

Q. Which one or both? A. I saw both of them after it all happened.

Q. How soon after the accident did they come? A. Oh, it was quite some time. It was after everything happened.

Q. Well, give me an idea how much time? A. Probably about three or four minutes.

Q. Did you have a conversation with them, with one, or both? A. With both of them after the acci-
737 dent.

Mr. Fisch: That is all.

Cross Examination by Mr. Parmer:

Q. Now, Mr. Russo, at the time of the accident, you were coming from aft forward? A. That's right.

Q. And you did not observe or take the trouble to observe, did you, whether two men were standing over here on the port aft side of the No. 3 hatch, did you? A. Right then, I did not, because at that
738 No. 3 hatch there, there is a ladder. They come down from the ladder. They come running down after the accident.

Q. I just want an answer to this question: Did you take the trouble to observe whether there were any men standing over here (indicating) at this place I am pointing to now, on the port aft side of the No. 3 hatch? A. No, sir.

Q. Did you or did you not? A. No.

Q. All right. Now, you say that after the accident you saw two men coming, running down a ladder? A. That's right.

247.

Vincent Russo—for Plaintiff—Recalled—Rebuttal —Cross.

Q. You say now that you recognize those two men as the men who were in court the other day? A. That's right. I recognized the men, when I saw them in the hall here. 739

Q. I see. And you haven't seen them at any time since? A. No, sir, just in the hall the other day, before the trial.

Q. Now, at the time of the accident, did you see the gangway man running away from the scene of the accident? A. Did I see the gangway man running away? No, sir.

Q. What is his name? A. Forti. 740

Q. Forti? He is the man who handles the slings? A. No, sir, he does not touch anything at all. The sling men have got nothing to do with the ship. They are off the ship. They are on the dock.

Q. But the man who gives the signals as to what shall be done with the sling, that is the gangman? A. That's correct.

Q. You did not see him at all? A. The gangway man?

Q. Yes. A. He is always on the side.

Q. I asked you, did you see him? A. Sure I saw him. I saw all my men there. 741

Q. Did you see him just before the accident? A. Sure. I saw him before the accident.

Q. And he is in court now? A. That's right.

Q. During the last week, have you been in Mr. Fisch's office? A. Last week?

Q. During this present week? A. I haven't seen Mr. Fisch in a few months.

Q. Have you been in Mr. Fisch's office during this week? A. No, sir.

Q. Now, at the time of the accident, did you see either winch man? A. No, sir.

742 Q. Did you see him shortly after the accident? A. The other winch man?

Q. When I say "winch man," I mean the man who was handling the rope. A. The up-and-down?

Q. On the other drum. A. I saw him after the accident. Sure.

Q. You knew he was there at the time of the accident too, didn't you? A. Well, it was his job to be there.

Q. Yes. A. He had to be there or else there wouldn't be anybody to operate the winches.

743 Q. And that man is in court now, sitting right back there? A. He is there. That's right.

Mr. Parmer: That is all.

Mr. Fisch: That is all.

(Witness excused.)

JOSEPH R. RUSSO, recalled as a witness in behalf of the plaintiff, in rebuttal, having been previously duly sworn, testified further as follows:

744 *Direct Examination by Mr. Fisch:*

Q. Mr. Russo, were in court yesterday when two of the crew members testified? A. Yes.

Q. Did you hear their testimony,— A. Yes.

Q. —what they stated? Now, they stated in substance or in effect that they were near the No. 3 hatch for 20 minutes before the accident, and that the spliced part of the rope got caught in the port boom, causing the starboard boom to go up. First, did you see these witnesses there at all? A. No.

They were not. I was at that spot on that side, 745
port side.

Q. Which spot were you? Will you come down and show us, please? We didn't have the model when you testified the first time.

(The witness left the witness stand and stood in front of the model.)

A. I was standing about here, looking down the hold.

Q. Wait. Turn around here. You were where? A. Standing about here, looking down the hold. 746

Q. Put your finger at the place where you were standing. A. About here (indicating).

By the Court:

Q. Where is that with relation to the port boom, Mister?

The Court: Agree on that, gentlemen.

Mr. Parmer: It is right alongside the port coaming of the hatch.

A. I was looking over the coaming like. 747

Q. Looking over the coaming near the port boom, right? Is that right, Mister?

The Court: Both of you agree on that description, Mr. Fisch and Mr. Parmer?

Mr. Parmer: It is the port coaming of the hatch.

The Court: Port coaming of the hatch near the port boom, is that right?

Mr. Parmer: That is what he says.

748 A. Yes, this is the port boom.

By the Court:

Q. How many feet were you away from the port boom? Here is the port boom. How many feet were you away? A. I don't know. I'd say there's the coaming. The niggerhead would be about here. The boom is right here.

The Court: Indicating about five feet.

749 *By Mr. Fisch*:

Q. Did you see any two men standing there? A. No, sir.

Q. Did you see them after the accident? A. Yes, I just saw the A.B.

Q. You saw the A.B.? Did you see the man who claims he was a carpenter at all after the accident? A. No, sir.

Q. Now, when did you see the A.B.? A. He came down the ladder on that ship. In order to get down to No. 3 hatch, he has to come down amid ships like on the bridge to come down the ladder.
750 He just come down that way, when I was on the starboard side. After the accident, I ran around behind the winch.

Q. How soon after it happened did the A.B. come down the ladder? A. A few minutes later, when everybody started running towards the accident.

Q. Did you talk to him? A. I had an argument with him.

Mr. Fisch: That is all.

Joseph R. Russo—for Plaintiff—Recalled —Rebuttal—Cross.

Cross Examination by Mr. Parmer: 751

Q. Have you been to Mr. Fisch's office at any time this week? A. This week? Yes, I was the other day.

Q. When? A. The other day, when I came to court, to know how to get down here, he said to meet him in his office.

Q. We began the trial on Tuesday? A. Yes. That is when I was at the office.

Q. Were you there? A. Yes.

Q. While you were there, did you see the gangway man there too? A. No, sir. 752

Q. At any time this week, while you have been in Mr. Fisch's office, did you see the gangway man there? A. No, sir. The last time I was there about a few months ago.

Q. Now, did you see the gangway man at the time this accident happened? A. Yes, I seen him about four weeks ago. We worked together on ammunition.

Q. That is not what I am asking you about. At the time the accident happened, did you see the gangway man on the deck? A. Yes, sir. He was on his job. He uses his hands. 753

Q. Whereabouts did you see him? A. He is on the starboard side, looking over the coaming to the dock to make sure nobody is in the way.

Q. In other words, you saw him right there at the time the accident happened? A. Yes, sir. He is on the job. Yes, sir. He is there.

Q. And you also saw this winchman on the port drum there too? A. Yes, sir. He had to be there.

Q. Right there when the accident happened? A. Yes, sir. He had to be there.

754 Q. Now, did you see this boom come up to the mast, as the carpenter testified in court the other day? A. The boom did not go up. I said that the draft went at a normal speed. He couldn't judge the boom.

Q. You say it did not go up? A. No, sir. The boom did not go up.

Q. Did you see those pictures with the mark at the top end of the boom? A. Yes, sir. You showed me that mark.

Q. You don't know what made that mark then, do you? A. No, sir.

755 Q. You are sure it was not made by the boom coming up and pressing against the nut? A. I wouldn't know.

Q. You wouldn't know? A. I know the boom did not jerk.

Q. Now, you haven't seen those two Latvian seamen at any time between the time the accident happened and when you saw them in court? A. That is all. I just seen them in court. He was out in the hall. I recognized him right away.

Q. You recognized them right away? A. Yes, sir, the A.B.

756 The Court: You may step down.

Mr. Fisch: I just have one more question.

Redirect Examination by Mr. Fisch:

Q. You keep talking about an A.B. Did you see the carpenter at all there at any time? A. No, sir.

Mr. Fisch: That is all.

The Court: All right, you may step down.

(Witness excused.)

DANIEL CARNEY, residing at 556 Third Avenue, Brooklyn, N. Y., called as a witness in behalf of 757
the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination by Mr. Fisch:

Q. Mr. Carney, in general, what is your business, please? A. Stevedore foreman, cargo repairman, surveyor.

Q. In the past, have you worked for any insurance companies in any particular branch of your business? A. I worked for the Travelers Insurance Company, the Great American Indemnity 758
Company, and the Massachusetts Bonding Company.

Q. In what capacity? A. Surveyor, Inland Marine.

Q. Was there any other name you gave to it in addition to surveying? A. Well, safety engineering, they call it, surveying.

Q. Now, you talked about cargo repairmen. What kind of cargo, what material have you repaired? A. Cases, bags, barrels, and other broken cargo that comes in on the ships.

Q. Did you have occasion to repair cargo made 759
of wood? A. Yes.

Q. Your experience has extended over how many years? A. All told, on the waterfront, 47 years.

Q. And have you done the same kind of work during all that period of time? A. I would say waterfront operations, yes. Sometimes as cargo repairmen, sometimes as hatch boss; other times, why, I have taken contracts on discharging vessels.

Q. Can you tell the difference between good wood and bad wood? A. I believe I can.

Mr. Parmer: I object to this witness'
760 testimony on the qualifications shown here. He is a longshoreman, as far as I can see.

The Court: Overruled.

Q. Did you see this exhibit marked Defendant's Exhibit K-1 yesterday in court? A. I have.

Q. Did I show it to you? A. You did.

Q. Did you examine it carefully? A. I did.

Q. Which portion did you examine? A. The portions with the groove on the top.

Q. Where it is broken, is that correct? A. Broken.

761 Q. Describe the condition of that wood, please. A. The condition of that wood is—

Q. No. I am pointing to something else now. You are taking a small piece,—this big piece. A. The condition of that wood, from the appearance of it, there is some deterioration there.

Q. What do you call it? A. Dry rot.

Q. And what is dry rot? A. Dry rot is a deterioration of wood where dampness and the elements gets into it and causes it to rot.

Q. Will you come down here for a moment and show the Court and jury what portion of this
762 wood you claim is affected by the dry rot? Just turn around so we can all see, please.

(Witness left the witness chair and stood in front of the jury.)

A. All in here, it's affected.

Mr. Parmer: Pointing to the dark spots, point to this dark area. That is where you put your hand.

A. The deterioration is right through it there.

763

Mr. Fisch: All right, get back to the stand.

(Witness returned to the witness chair.)

By Mr. Fisch:

Q. Now, are there any other marks that you can discover, deterioration from the outside? A. Cracks and crevices.

Q. And when you see those things, those cracks and crevices, is there a way of testing as to whether there is deterioration? A. There is by a few: Make an inspection of it, and you take and you put what they call a tryer on it. That is like a corkscrew, a gimlet. You insert it in the cracks or the crevices and drag it out, and when the duct comes out, why, it will take and show you the difference. Then you can take and go up your boom to another crack, and take it, and if there is—take another try at it, and maybe it will show you different, and it may show you the same thing. It's according to how far the deterioration has run.

764

Q. Because the crack is something that permits the elements— A. The water and other elements to get into the crevices to deteriorate.

765

Q. Now, you told us a moment ago that you were engaged in the stevedoring business or the operation for 43 years. Have you been engaged in every branch of the stevedoring operation? A. Right from the bottom up; from the time I left high school up until the present date.

Q. And were you in business with your father

or with your uncle? A. I was in business with my
766 uncle. Then I worked for my uncle before he died.

Q. What was the name of the firm? A. J. C. Carney & Sons.

Q. Does cooperage, that is, repair of wood and cases and boxes and everything else, come under the general heading of stevedoring? A. Well, we done that. We also done,—the J. C. Carney & Sons was coopers and stevedors.

Q. For how many years did you work for these insurance companies as safety engineer? A. On
767 and off for the three companies about 15, 16 years.

Q. Now, as the hatch—did you say you were a hatch foreman or hatch boss?

The Court: He said he was a cargo repair man and stevedore foreman.

The Witness: That is a hatch boss, your Honor.

Q. And the hatch boss, what duty has a hatch boss? A. The hatch boss looks after the discharging and loading of the cargo into the ship, supervises it, and also rigs the hatch up to take the cargo out or put it in.

768 Q. [illegible] you had experience in that kind of work constantly for 43 years? A. On and off, yes, constantly, for 47 years.

Q. What vessel have you been on last as a hatch boss? A. About three months ago, I worked on the Booth Line steamer, Pier 33.

Q. What capacity did you occupy there? A. Hatch boss.

Q. You know then as hatch boss how the work is done? A. Yes, sir.

Q. Are you acquainted with the setup as it's shown in this model, Exhibit E? Are you acquainted with the setup of the booms, and so forth? A. Yes. 769

Q. Will you come down, please? A. (Witness left the witness chair and approached the model.)

Q. Assuming that nine bags of cocoa beans, weighing about 1,000 pounds, were first taken up from the hold by the up-and-down fall here, which is on the port side; and then the man operating the niggerhead on the port side, slacked off. After he slacked off, the man operating the niggerhead on the starboard and also operating the Burton boom took hold in the sense that he was taking the cargo in the manner in which I have shown you. There has been testimony that while this was taking place, the spliced part of the rope got caught in the block on top of the port boom. Is that possible? A. Impossible. 770

Q. Tell the Court and jury why it is impossible? A. When you take the draft up out of the hold, she comes up on what you call your cargo fall, or, in other words, longshoremen term, it's as picking it up.

Q. A rope or a cable? A. It's a fall or a cable rope, or cable, whatever your fall is made of. If it is a rope fall, why it is a rope, and if it is a cable, why it is a wire cable fall; but when he hoists it up, he takes it up a certain part and lifts it up so many feet from the floor of the hatch or from the top of the other cargo box or then the gangway man signals for the man on the Burton. 771

Q. That is this here (indicating)? A. The the Burton here. And by the way, this is rigged, shows a drum end rig. He takes—he takes a few turns around on the drum end. The drum end, he

switches on the left hand, and then when she gets
772 to a certain height over the coaming of the hatch, about two feet over the coaming of the hatch, the Burton man drags, and he drags it about that level (indicating) to clear the rail of the ship to make a landing of the draft on the dock, which would be in this manner (demonstrating). And she hangs right above the coamings or the rail of the vessel to clear the rail of the vessel. Then the man on the—the man on the port side port, drum end, which is the pick boom, or the picking fall, he slackens up, and the other man takes one or
773 two more turns, and she swings over the side, which just about, within about two foot, maybe less, maybe more, just to clear the rail. Then he slacks away on the drum end and lowers it down unto the dock to the stool or on the bench, as we call it, the landing bench; which other people takes it, picks it up, and takes it with a tractor and takes it away on the dock to parts of the dock, wherever it is possible.

That is the way the discharging operation of a bag cargo is done. At that time, the splice, the splicing, the fall, would be where the hook is spliced on to the ring.

774 Q. Show that to the Court and jury, please, where the splice would be. A. The splice would be down here, where it's on to the coupling ring, the couplings, both, to the falls; and there is a splice on one fall and a splice on the other, a short splice which we call as an eye splice. When that eye splice goes in, it's right down on the hook, and that never reaches the top of the boom at any time, because the draft clears the side, and naturally, a man working on the drum end is not going to talk, and he is watching his draft all the

time, because he must take his turns on or take his turns off or put turns on, whichever way he needs; and in case anything goes wrong, all he has got to do is let go in his hands easy, and let her sag, what they call sagging. The drum will keep going around, but the draft won't hoist. So, therefore— 775

Q. Why won't the draft hoist? A. Because the rope fall is sagging on the drum end.

Q. You mean the coils here are loose on the niggerhead, is that correct? A. They are loose on it, until he pulls tight. When he pulls tight—

Q. They don't take when they are loose? A. Then she will take ahold and she will hoist. The drum end man is watching, the gangway man is watching his draft, and the drum end man is watching the draft at all times when they are working on the drum end. 776

Mr. Fisch: That is all.

Cross Examination by Mr. Parmer:

Q. Mr. Carney, your explanation, correct me if I am wrong, of why this splice cannot, that is, impossible for that splice to go through that block, is that the man running this niggerhead here on the port side is watching it all the time? A. Watching it all the time. 777

Q. Yes, but if he is not watching it all the time, what will happen? A. The gangway man is watching.

Q. Suppose he is not watching it, suppose the longshoremen don't do the right thing, then can the splice go through the block? A. No, because the man on the Burton, he is taking his turns on, and he has got his turns on there, and he holds it

off, and he holds it just a certain space, and he
778 pulls it away from the drum, the port boom over to the center of this starboard boom, see, so, to fetch it over the rail, where he takes the turn on there, similar—he pulls in that way (demonstrating).

Q. You are assuming that all of these longshoremen or one of them at least is going to step in there and sort of prevent this thing from being done? A. That is a way, that is the only way you can make an operation on it. This here man, he must have—he has got his turn on this drum end.

779 Q. You are assuming, Mr. Carney, that in the normal operation, this splice here is not going to go through the block. That is right, isn't it, in the normal operation? A. It don't go as high as the block, in any operation, it won't, because the Burton falls prevent it.

Q. Wait just a minute. In the normal operation, no longshoreman is going to run his winch or his drum in such a manner as to pull this draft up so that the splice goes through the block. That is to say, we are all agreed on that. A. In any operation, he doesn't fetch it up—he doesn't fetch it—he don't fetch it up to the hatch coaming, be-
780 cause the Burton takes ahold.

Q. Now assume, Mr. Carney, that before a Burton takes ahold, assume that now, the up-and-down man goes ahead with his winch and does not stop, won't the splice then go up and enter the block? A. No, because your Burton man, when he gets up, after he takes it up off the top of the other bag and clears the top of the other bag by a few feet, the gangway man signals for the Burton man to go ahead, and then he takes the strain right on it, which is an assist to the hoist.

Q. Now, Mr. Carney, let's go through it just as I asked you to assume it. Now, here is your Burton man. The Burton man does not do anything. All right, now, assume it. He is not going to do a thing. Here comes the up-and-down man. He pulls, he does not stop pulling, and he keeps on pulling. Still, the Burton man does not do anything. He keeps on pulling. And, finally, the splice goes into the block. Did you see me do that by the operation of these falls just before or as I was now? Did you see it? A. I never seen it. 781

Q. Did you see what I just did? A. I just see what you just did, but— 782

Mr. Fisch: Let him answer, Mr. Parmer. Let him answer.

A. I just see what you just did, but I can't see where the man takes it up to that height. He doesn't need it at that height. He don't have to fetch it up for the boom man to take her to drive her across.

Q. In other words, if he takes it up to that height, that is, angle— A. What?

Q. In other words, if he takes it up that height, this angle— A. He can't take it up, because the Burton man won't let him. The Burton man has got ahold on it. 783

Q. If the Burton man doesn't have the hold on it and he is not paying attention, then it goes up, isn't that right? A. The Burton man must have a hold on it because both of his falls is coupled. What has he got his falls coupled for?

Q. Are you assuming, Mr. Carney, that longshoremen are careful at all times, in giving your

answers to these questions? A. A longshoreman is
784 careful at all times?

Q. Yes. A. That is the way the ship is rigged for that.

Q. Are you assuming that longshoremen are careful at all times or haven't you seen longshoremen guilty of careless acts and negligence, in your experience?

Mr. Fisch: Your Honor, we are going far afield: "Haven't you seen longshoremen in your experience being negligent?"

The Court: Sustained.

785

Q. Are you assuming, for the purposes of your answer to this question, that the longshoremen do not make mistakes, not negligent? Answer that yes or no, if you will.

Mr. Fisch: Same objection, your Honor.

The Court: Overruled.

A. No.

The Court: The answer is no.

786 A. No.

Q. Now, if you assume, Mr. Carney, that these longshoremen are not doing what they ought to be doing, that they are making—they are doing the wrong thing, assume that now,—assume that they are doing it wrong, not the right thing but the wrong thing, can't they then produce this result, where the splice— A. Where the splice goes in the block?

Q. Suppose they do not do it right? A. The Burton prevents it. You have got two falls cou-

pled together. Your Burton falls prevents it, because he must have a hold of it, because he must assist on the lift. 787

Q. You see, Mr. Carney, I am asking you to assume that he is not doing that. A. How did the cargo come up out of the hold?

Q. Well, now. All right. I am asking you to demonstrate that to the jury now yourself. Listen, now. Listen to the question. The Burton man does not bring the cargo up out of the hold, does he? A. He does. He assists.

Q. Now, Mr. Carney,— A. Where the falls is coupled, he assists in fetching it up. That is the reason you coupled the falls. 788

Q. Mr. Carney, when the draft is raised from the hold, do you say that the Burton fall has any of the weight of the cargo on it? A. It does, when it gets up.

Q. I said, when it's being raised up. A. He does. He assists on the lift. That is the reason your falls is coupled.

Q. Now Mr. Carney, do you see that on an up-and-down, the pull is in a straight up-and-down direction? A. Not always. It's a drag some time.

Q. As we have it here, it's an up-and-down direction? A. Yes. 789

Q. If you pull with the Burton while it's coming up, you only succeed in bringing the cargo over into a different position of the hatch, do you not, and thus put an additional strain on the up-and-down? Isn't that true? A. No. I will explain it. The way that you have got this rigged here, you have got—both falls is coupled up, which shows it here. There's—your falls are coupled, both your falls is coupled up. This brass object, I believe it must rip your draft. Your Burton man, the

man that makes up them drafts, is on the other
790 side of the square of the hatch, underneath, the other side of the coamings. When he makes that draft, the Burton man must have ahold, because he must take and make that drag to drag it out.

Q. Yes. A. To drag it out, and then the up-and-down man goes and the upper man picks it right up. The up-and-down fall picks it up, in this fashion. The other man is helping with it. He is assisting, until he gets till about two foot, maybe a little more than two foot, over the square of the hatch, over the coaming.

791 Q. Let's go back and analyze just what you said, Mr. Carney. You started with the assumption that the cargo is in the wings of the ship. Right? A. Yes, it's piled all over the square of the hatch.

Q. All right. We will go right along with you. And at that point you say the Burton has to be used in order to drag the cargo in a lateral direction out into the square of the hatch? A. Out to the center so as to give him a straight pick-up.

Q. Yes. In other words, the Burton is used to move the cargo in a lateral direction, isn't that right? A. Pull it up, right, down in the hatch.

Q. Maybe you don't understand me. When I
792 say pull it in a lateral direction, I don't mean it will pull up and down. I mean pull it in a lateral direction, from side to side. A. Bring it from the wings to the center.

Q. Yes. And that is the pull from a side to side direction, isn't it? A. Pulling from the wings, yes.

Q. I said from side to side. Is there anything objectionable about that? A. No. It's the same answer.

Q. And then after it gets into the square of the

hatch, then it has to be raised and the up-and-down raises it? Right? A. The up-and-down and Burton, both. 793

Q. Let's examine that. If the up-and-down is raising it and you exert power on the draft by means of the Burton, do you do anything more than pull the draft away from its position under the toe of the up-and-down boom? A. You take and you assist with the lift. You assist with the hoist out of the hull with a couple fall.

Q. In other words, the Burton can be used? A. The Burton is used to assist in the hoist.

Q. The Burton can be used to bring the load over to a position of the toe of the boom and then the two falls pulling together can assist in the hoist? Correct? A. The Burton, the up-and-down and the Burton, goes ahead and picks it up, see, takes the strain on the draft, such as I get it here now (demonstrating). 794

Q. Yes? A. The Burton comes along and he just pulls it out, if it is in the wings, right side or left side, whichever you want to drag it. He pulls it out. It's then within about a foot, two foot over the top of the other cargo bag, piled in the hold.

Q. Yes? A. The Burton man has always got ahold. The gangway man gives a signal for him to go ahead. The both falls goes ahead, until they hit the coamings of the hatch or a few feet above the coaming, see, a few feet. Then the Burton man will take and pull it over to the Burton boom, so as to land it on the dock. 795

Q. Mr. Carney, do you know the question I asked you? A. Yes.

Q. What question did I ask you? A. You asked me, did both falls take a hoist. I said yes.

Q. That is what I have been waiting for. Thank
796 you. Both falls— A. —assist in the hoist.

Q. Both falls can assist in the hoist? A. They assist in the hoist.

Q. You don't know, do you, just what these longshoremen were doing on the day of the accident? A. I don't know nothing.

Q. You don't know whether they were working in the way that you just described here, where the up-and-down and the Burton were both assisting in the hoist, do you? You don't know that? A. Why did they couple their falls, if they didn't
797 make for an assist?

Q. Mr. Carney, it is perfectly possible, is it not, to unload the cargo this way—just possible, maybe you haven't seen it. I just asked you whether it is possible for the load to be raised entirely by the up-and-down, and after the up-and-down has raised the cargo over the square of the hatch, for then to have the Burton take hold in order to bring it across the deck? That is possible, isn't it? A. No, because if it was possible, you wouldn't couple your falls. You work it with a single whip. You wouldn't need it coupled.

Q. Isn't the purpose of coupling, Mr. Carney,
798 simply so that you don't have to put the Burton fall on the up-and-down each time the up-and-down comes up? You have done it already. Isn't that the purpose of coupling it? A. The purpose of the coupling is for both falls to take the strain and take the weight of the lift.

Q. Now, isn't it possible to do it in the way that I described,—maybe you don't approve of it—but isn't it possible to just have the coupling there so that you don't have to couple the two up each time you bring up some cargo; and then—

Mr. Fisch: Just a minute, Mr. Parmer. Are we speaking about an operation where the rope, where the slings are coupled, or are you speaking where there is no coupling? 799

Mr. Parmer: I am speaking about a situation where two falls are coupled.

Mr. Fisch: Where they are coupled?

Mr. Parmer: Yes.

Mr. Fisch: I have no objection—we object to that because that question assumes that you do not have to couple the fall here, and we are only talking about a fall that is coupled.

800

Mr. Parmer: I think you misunderstood the question, Mr. Fisch.

The Court: Overruled.

By Mr. Parmer:

Q. Do you understand it? A. I understand the question. The question is, if it is possible for to take and fetch it up on the cargo fall.

Q. On the cargo fall, merely have this couple, so that each time you bring it up, you do not have to put the Burton on; it's there already for convenience? A. No.

801

Q. You don't think that that is even possible? A. It is not possible, because you wouldn't couple your falls, use both falls for to take and give the draft—to take the weight of the draft on both falls where you are raising two falls. If such was the case, you wouldn't have a Burton fall. All you can do is take and have a man on the guy and sling your boom any way you want.

Q. You are really telling us you think it is inadvisable to do it that way? A. Not at all inadvisable. I am saying that the reason the fall is

coupled and that the both falls is coupled together,
802 is one fall must assist the other in making the hoist.

Q. In other words, that is what you would do? A. That is what any hatch boss would do. You must get the cargo out.

Q. You have never seen it done this other way? A. Not with a coupled fall; no.

Q. Now, would you resume your place on the stand, Mr. Carney?

(The witness sat down in the witness
803 chair.)

Q. Mr. Carney, has your experience with wood been with the wood used in repairing cargo in coopering, and so forth? A. No. I have made surveys of conditions on a sidings, planking, deck, and other equipment on board inland marine vessels, lighters, decks, and the like of that, some lighters.

Q. Then you have had some experience with wood where there was dry rot? A. I have, yes, lots of it.

Q. You are relying on that experience now in
804 saying that there is dry rot in these exhibits which have been shown to you? Is that correct? A. Your piece there.

Q. Could you answer that question: You are relying on your experience? A. On my practical experience, yes, on what I have seen, yes.

Q. And this wood here is, this Exhibit K-1 and K-2, is similar to cases within your experience which, in your opinion, have been dry rotted? A. Where I found dry rot, yes.

Q. Now, take this exhibit, K-2? A. Right,

Q. Do you see any dry rot on the end of that? A. It has been well shook off. She is still porous. 805

Q. Mr. Carney, the question was, do you see any dry rot on the end of this Exhibit K-2? A. Traces of dry rot, yes.

Q. You see some traces? A. Traces of dry rot.

Q. Will you point out just one of them? A. Right in here, right in here, she's porous, but you can see the porous there.

Q. You can see pores in wood? Is that what you have been assuming? A. She is a little porous, more porous than what you will find than on the clean side. 806

Q. Do you mean that these cells of the wood, the cellular construction of the wood, is a porous condition indicating dry rot? A. That takes in and shows whether there has been rot there, yes.

Q. I want you to mark it so that we won't have any mistake about what you mean. Have you got your glasses? A. Yes, sir.

Q. Can you see the holes without the glasses? Can you? A. Sometimes.

Q. Did you see them that minute when you were pointing them out to me without your glasses? A. I have seen them yesterday when I had the glasses on. 807

Q. When I asked you to point out the place on this exhibit where the dry rot was, you didn't have your glasses on. Could you see it at that time when you were pointing it out to me? A. See the porous part?

Q. Answer that question, please. A. Partly, yes.

Q. Could you see it with those eyes of yours and without your glasses? A. Partly. I can see it better with the glasses.

Q. Now, you have got your glasses on. Will
808 you now look at it again and point out the place where you see the dry rot or the evidences thereof? A. All through—all through right in here, right in here (pointing) shows porous.

Q. I just want one place where you see a pore, which you say shows just one pore. Can you point out one pore? A. I will mark it for you. Want it marked?

Q. I would like to have it marked. A. (Witness marks.)

Q. That is one. One is enough. Can you see
809 those pores? A. I can see those pores.

Mr. Parmer (addressing the jury): The witness points to this here, this part here, and this part here, as showing pores, showing dry rot.

Q. Now, is the dry rot that you see on this Exhibit K-2 and which you have just marked similar in character to the dry rot you see on this other exhibit marked K-1? A. Which is K-1?

Q. This is it? This is K-2 and K-1. I ask you if it is similar in character to it? A. Similar in
810 character and the discoloration is the same.

Mr. Fisch: Watch it. It is going to roll off (referring to the exhibit).

Q. Do you see any discoloration on this K-2 at the place where you made the mark? A. Yes. This is the discoloration.

Q. I mean a discoloration in addition to the discoloration of the pencil mark which you just put on it. A. Discoloration, she has a discoloration all over.

Q. Never mind "all over." A. Yes.

Q. I want to know this particular space. Do 811
you see any discoloration of the place that you put the pencil mark? A. Yes.

Q. In addition to the pencil mark? A. Yes.

Q. What color do you see there beyond the color of fresh wood? A. Of fresh wood, there is no color of fresh wood.

Q. It is not? A. No.

Q. When you have a condition of dry rot, how does that affect the wood? A. It's a decay.

Q. Yes? And how does that affect the wood with respect to its tensile strength? A. Deterioration 812
tion cuts it down, cuts down the tensile strength.

Q. In other words, it becomes soft, doesn't it? A. In other words, it becomes—in other words, it is not able to take the strain and the original piece.

Q. Do you know what "soft" means? A. Yes.

Q. Well, will you tell me whether the wood becomes soft when it becomes dry rot? A. Certainly. It becomes soft, much softer than the other part that has not got the dry rot.

Q. And it becomes easy to cut, doesn't it? A. Well, yes.

Q. So wood that has dry rot in it cuts very easily, doesn't it? A. It's according to how much 813
dry rot and how long the dry rot is in there,—

Q. Yes? A.—the length of time the dry rot—

Q. So that if the wood has a considerable amount of dry rot, it is very easy to cut the wood, correct? A. It's according to how long the dry rot has been there and how long the wood has been in decay.

Q. If the wood is very hard to cut, that means that there is hardly any dry rot in it. Isn't that right? A. When it's hard to cut?

Q. Yes. A. Well, as I testified, as I said before,
814 it's according to how long the dry rot has taken in—how long the deterioration has started.

Q. Now, if you were to cut or try to cut some of the wood of this exhibit before you and you found it very, very hard to cut, what conclusion would you reach with respect to the amount of dry rot that there was there, if any? A. The amount of dry rot?

Q. Yes. A. Taking it from the stick itself?

Q. What is that? A. Taking it from the stick itself, which is classified as a hard wood,—

815 Q. Yes? A. —white pine.

Q. Yes? A. There are other people that would term it as Northern pine. You will find it that she is much harder, where there is no deterioration on the cut than what you are where deterioration is.

Q. Suppose that we let you cut some of this at the place where you say the deterioration is, and, on cutting it, you find it to be very, very hard, very difficult to cut, what is your opinion then with respect to that—

By the Court:

816

Q. Would that change or alter your opinion? A. No, it wouldn't alter my opinion as for the deterioration at all.

By Mr. Parmer:

Q. Tell me, Mr. Carney, is there any dry rot on this end where they cut it with the saw? A. No. The only thing, it takes and shows on this where they ripped it, that they left an abrasion from the saw on account of the way it was cut. They didn't

cut it smooth, where a power saw would cut it much smoother. This is very, very hard wood. This is what they call white pine. 817

Q. And you are suggesting, are you, or saying, testifying, that at the present time the wood is hard and sound at the end where they sawed it? A. It shows it—

Q. —And not so hard and less sound at the end where it broke? A. That is right.

Q. You are saying that, are you? A. Yes, sir.

Q. Then there ought to be a difference in the speed with which you can cut it, isn't that so? A. Well, you can cut off parts of deterioration of lumber where the deterioration is a longer stage than what you can where hasn't quite the same length of time. 818

Q. You can cut it faster? A. And the longer the deterioration, the heavier the rot, yes.

Q. Have you got a knife with you? A. No, I have not. I haven't even got a tryer.

Q. That is, you haven't even got a tryer? A. I didn't carry it with me.

Q. Now, Mr. Carney, I want you to take any place that you please, you suit yourself, and show us, by trying to cut this wood, that it's soft because of deterioration, produced by dry rot. I want you to show by the speed with which you can cut it with a knife, please. A. According to how sharp the knife is. 819

Q. If you don't think the knife is sharp, we will get one sharp enough to suit you. A. Right here (demonstrating). There you are. Now, take this side here. Here is where I cut it.

Q. You say that is dry rot? A. I say there is deterioration of rot there, yes.

Q. Now, wait a minute. Now we are going to

take out some slivers and examine them; also let
820 us take some from the other side.

The Court: Let the record show what the witness did. The witness cut some ends from the rough side of the exhibit, cutting horizontally.

Mr. Parmer: Yes, cutting horizontally.

The Court: Counsel for the defendant has just cut two slivers from the rough end, cutting into the exhibit, in the opposite direction from which the witness cut.

821 The Witness: That is cutting into the grain.

The Court: Cutting into the grain.

By Mr. Parmer:

Q. See if you can cut some of this wood out. A. You are never going to cut it that way, Mister.

Q. No? You don't think I am going to? Well, you will see. Did you notice that wood come up quickly from the good end? A. Yes, sir.

Q. Now, let us cut some more of this. A. All right, sir.

822 Q. There isn't any difficulty when you get started on this thing? A. No difficulty whatsoever, because you are cutting with the grain. You are not cutting—that is not a cut. There is a piece of the grain. You can see it lifts right up.

Q. All right. Once we get the sliver out, we will cut it across the way that you like it. Have you got some of the wood from the other end, that you are saving? A. Yes. You have got a couple of slivers here.

Q. All right. A. You didn't cut it. You slivered it.

Q. Let us see the difference in the cutting of the wood. Those are three pieces. A. Three slivers on the grain, yes. 823

Q. On the end where it broke, right? A. Yes.

Q. Here is a sliver from the other side where it is cut. A. Yes.

Q. Will you cut it? Just put it down there and instead of taking it up in your hand, cut it, if you will. A. To cut it, I must hold it.

Q. Put your fingers on it. That's all. Are you putting pressure on that? A. Not so much.

Q. You haven't cut it yet, have you? A. No.

Q. That is a sliver from the end that broke? A. That's right. 824

Q. And that is the wood that is affected by dry rot? A. Yes. Now, take the piece, the sliver here (indicating).

Q. That is the sliver from the o side. You see the paint on it? A. I see it. Yes.

Q. All right. Try that. You have put all your strength on that. Have you been able to cut it yet? A. Just made a gash in it, that's all.

The Court: You had better indicate for the record just what has been done there, Mr. Parmer.

Mr. Parmer: Very good. 825

A. Will your Honor—

Q. Just wait, just a minute.

Mr. Parmer: Here is a piece from the end of the wood which the witness says is defective. He has put his strength, with the knife on it, and the nick of the knife is there, but it is not cut through.

The Court: That is from the defective
826 end?

Mr. Parmer: That is from the defective end.

The Court: That is the ragged end?

Mr. Parmer: The ragged end. Here is likewise a piece from the sawed end which the witness says is in good condition. He has put his strength on that, and here is the nick in that, which hasn't gone through.

The Court: You had better put both those slivers in that envelope, have the Re-
827 porter mark them as a separate exhibit; first, the one from the jagged end and second the one from the butt end or the sawed off end.

The Witness: That is a sliver with the grain.

By Mr. Parmer:

Q. Sliver with the grain? Can you take a sliver against the grain? A. No, you cannot.

Q. It cannot be done? The only way you can get a piece of wood out of that for testing is to
828 take a sliver, is that right? A. Take a sliver.

The Court: Have you got those two pieces?

Mr. Parmer: I have them, but I haven't them identified. Here is the jagged end.

(Jagged end received in evidence and marked Defendant's Exhibit V-1.)

Mr. Parmer: And here is the sawed end.

(Sawed end received in evidence and marked Defendant's Exhibit V-2.) 829

Mr. Parmer: I am finished with the witness.

Mr. Fisch: I am finished with the witness, your Honor.

The Court: All right, you may step down.

(Witness excused.)

The Court: We will recess now, ladies and gentlemen of the jury, as far as you are concerned, until 2:30 P. M. Do not discuss the case among yourselves nor permit anybody to discuss it with you, and do not visit the scene of the accident. Be in your seats at 2:30. 830

(Whereupon a luncheon recess was taken until 2:30 P. M.)

AFTERNOON SESSION

831

(Testimony of Dr. George H. Hyslop omitted.)

832

CHARLES W. STEUERWALD, residing at 604 Boulevard East, West New York, N. J., called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination by Mr. Fisch:

Q. Mr. Steuerwald, what work do you do? A. Marine carpenter.

Q. Before you came into court yesterday, had you ever met me? A. No, sir.

833 Q. Did you ever meet Mr. Schiffman in my office? A. No, sir.

Q. Have you ever been a witness in any case at all? A. No, sir.

Q. For how many years have you been marine carpenter? A. Fifteen years.

Q. When you say marine carpenter, what work do you do? A. Carpenter work on ships.

Q. And does that carpenter work involve the wood on every part of the ship? A. Every part of the ship.

Q. And that work you have been doing for fifteen years? A. Fifteen years.

834 Q. Can you tell whether wood is good or bad, by looking at it? A. Yes, sir.

Q. Did I show you this Exhibit K-1 yesterday, Mr. Steuerwald? A. Yes, sir, you did.

Q. Now, I direct your attention to the rough part of this K-1 and ask you to tell us whether the wood is good or bad. A. Do you mind letting me see it a little closer? Dry rot. Pick it off with your fingers (demonstrating).

Q. Now, a few envelopes—

835 The Court: Are you all through with the exhibit now, Mr. Fisch? All right, we will have it taken down.

Q. What produces dry rot, Mr. Steuerwald? A. From the looks, I observed on that boom there is quite a big fissure in it, which would allow water to run in there, and over a course of years, it would form a dry rot.

Q. And the fissure extends to the outside of the boom, does it not? A. Yes, sir.

836 Q. As a matter of fact it begins on the outside and goes inward? A. That's right.

Q. Now, there are some samples picked out by Mr. Augenti, a witness for the defendant, and it is marked. That is what that is, marked—

The Court: That's right, Augenti, Mr. Fisch, Augenti are the oblong envelopes.

Mr. Parmer: Here they are, over here.

Mr. Fisch: Your Honor has got a better memory than I have. I can see that.

What are those?

837 The Court: Those are chips which were taken off this morning while your expert, Mr. Carney, was on the stand.

Mr. Parmer: This was at the time of the sawing.

The Court: That is at the time of the sawing, at the time when Mr. Parmer was cross-examining the captain.

Mr. Fisch: Yes, your Honor. I picked up the pieces and put them in an envelope.

Charles W. Steuerwald—for Plaintiff—Rebuttal —Direct.

838 *By Mr. Fisch:*

Q. Look at these pieces, Defendant's Exhibit K-3. A. This is virgin pine. If that was a solid piece of wood, you couldn't break it off with your finger that way. You can bring that bit up. I [illegible] it and show you. It will be impossible to sp[illegible] wood with your finger unless—like that (indicating). Here is one here, a piece, just the slightest little pressure. I saw you using a knife before on it, but this here, you can break, you can crumble up, powder with your finger. That is
839 what you call dry rot. It is not with only one finger. You can do it with practically all of them, —no pressure at all. You can also see that it is dry rot.

The Court: Let the record show the witness broke some small pieces from the exhibit with his fingers.

By Mr. Fisch:

Q. Mr. Steuerwald, looking at the appearance of the big piece, can you state for how long a period
840 that dry rot has existed, approximately? A. Well, I couldn't just say.

Q. Approximately for how long a time? A. Well, five, ten years, sometimes.

By the Court:

Q. Not "sometimes" but looking at the exhibit, can you tell us with reasonable certainty in your opinion how long the dry rot can you say was there existed prior to January 1944?

841

By Mr. Fisch:

Q. —Before the accident. A. I'd say between five and ten years.

By the Court:

Q. Is that a guess? A. No, sir. It could happen within them periods. All depends on how it was weathered.

842

Mr. Fisch: That is all.

The Court: You had better return now, Mr. Fisch, the exhibits to the envelope.

Mr. Parmer: Would your Honor allow him to remain there just a minute?

The Court: Certainly.

Cross Examination by Mr. Parmer:

Q. How did you happen to get called into this case? A. I came from the union.

Q. What union is that? A. Marine Carpenters' Union. Mr. Young, our delegate, met me yesterday and asked me could I come down to a case and testify.

843

Q. I see. A. I said, "I don't know anything about any testimony. I have never been in court in my life." "Well," he said, "now, the lawyer by the name of Mr. Fisch wants somebody to come down to the court." So I came down.

Q. And you came here and you looked over these exhibits? A. Yesterday, yes, sir.

Q. And you formed your opinion at that time? A. I did, sir.

844 Q. And you were ready to come up here and demonstrate your knowledge of it to the jury as a result? A. Not to the jury. I am not trying—I am only testifying as to my belief.

Q. Now, you find all of these pieces similarly easy to break or do you find it only possible to break the little ones? A. Of course, naturally, the thicker the wood gets, the harder it's going to be to break. There is a certain amount of strength in the wood, but if any wood was in good condition, you couldn't powder it up into a powder.

845 Q. I see. A. Now, that shows you there is dry rot. Remember, this is only part of the butt. There is about 18 inches more, maybe three feet more, that lays in where the saddle is, that would be thoroughly rotted, which ain't in court.

Q. Instead of arguing— A. I am not going to argue.

Q. All right. Would you mind just answering the questions, sir— A. Yes, sir.

Q. Just that. A. Yes, sir.

Q. If I gave you a match,— A. Yes.

Q. —you'd have no difficulty in breaking it? A. Positively not.

846 Q. Well, that wouldn't indicate to your mind that the match had dry rot, would it? A. But if you gave me a piece of the butt, the same size, I couldn't break it.

Mr. Parmer: May—

Mr. Fisch: Could we have the answer?

Q. Would you answer the question? A. Yes, sir.

Q. That wouldn't indicate to your mind that the match had dry rot in it, would it? A. No, sir.

847 Q. But yet if that match were—that is, if the wood of the match were much bigger, in the form of a match, it might be very difficult for you to break it with your fingers. A. Naturally. Naturally.

Q. So you could take even good wood and if you get it down into such a small piece, you could break it with your fingers, dry rot or no dry rot? A. That's right.

Q. What you have done here in demonstrating what you can do with your fingers before this jury is to pick out the little pieces and break them? 848 A. Naturally, I couldn't break that with my finger.

Q. Just "Yes." Just before you picked out one of the little pieces, you had one of the bigger pieces in your hand and you put it down and transferred your attention to the little one? A. That's right.

Q. Because you knew you couldn't break it? A. Now, wait a minute. I can powder that piece up, and that is pretty big.

Q. Do you see what you are doing? A. Sure. I am taking the rot off of it.

Q. Do you recall where this piece came from? 849 A. No, I wouldn't know. How would I know where it came from?

Q. You were not here when it was cut from the piece, were you? A. No, sir.

Q. Are you acquainted with booms? A. Yes, sir.

Q. Are you acquainted with iron straps— A. Yes, sir.

Q. — near the goosenecks? A. Where the boom is, that's right.

850 Q. Yes? A. Yes, sir.

Q. You are acquainted with the fact, aren't you, that iron rusts? A. That's right. There is iron rust.

Q. If exposed to the weather, so it rusts? A. That's right.

Q. And you are acquainted with the fact that, in connection with all booms, when the iron that forms the gooseneck rusts for a certain portion of the wood, the iron rust, associates itself with the wood? A. What has that got to do—I am not an
851 expert on iron. I am not an iron man. I am a wood man.

The Court: Answer the question, Mr. Steuerwald. If you cannot, you are entitled to say, "I can't answer it."

The Witness: I don't quite get his question.

The Court: We will have it read to you.

(The following question was read by the court stenographer:

"Q. And you are acquainted with the fact that, in connection with all booms,
852 when the iron that forms the gooseneck rusts for a certain portion of the wood, the iron rust, associates itself with the wood?")

Q. —which is next to it? A. Naturally. We will put this in the back (referring to pieces of wood).

Mr. Fisch: Wait a minute. We will take that away. I want to put it in the bag.

853 Q. Do you realize that those—don't you realize that the pieces which you just saw came as a result of cutting away at the place where the iron strap ended, the point of the iron strap ended? Did you know that? A. That was the point where the end of the strap was?

Q. Do you see it right here? A I see a black mark on there.

Q. Do you see the angle I am pointing to? A. I see a discoloration there, yes, but I wouldn't know whether it would be the angle, whether it would be there or not.

854 Q. Look on the other side. A. This is where the crack is that I was talking about. You mean to tell me that the angle was in there?

Q. Well, I do mean to tell you that, but does it disappoint you to find it out?

By the Court:

Q. Can you answer the question? A. Yes. I will look at it and tell.

Q. He wants to know, does that disappoint you— A. What is that?

Q. —to find that that was the angle there? A. 855 Oh, no. No, no.

Q. That does not disappoint you? A. Does not disappoint me at all.

The Court: Now, is there another question, Mr. Parmer?

A. That is a possibility that could have been the end of the angle.

856 *By Mr. Parmer:*

Q. And on the other side, it is the end of the angle too? A. Naturally.

Q. This wood that you have been dealing with and holding in your hand and testing is the wood which has become associated with the rust from the iron. You know that now, don't you? A. Yes, same thing. Yes.

Q. It's the wood that has become associated with the rust? A. I can pick out—off any pieces. You are right. That is the same. Practically the
857 same place.

Q. It's only at that point where the wood has become impregnated with the rust from the iron that you are criticizing? A. I am not criticizing that because of rust. I am criticizing this because it is rotted, not because of rust.

Q. All right. Now, let us understand each other. It is only— A. Pardon me just for one moment. I will turn this around (referring to exhibit) and I can't pick that off with my nail.

Q. No? A. Not one piece, because that is solid. That is not rot here. That is not rot.

858 The Court: Indicating the sawed off end.

A. But this end, it was rotted.

Q. It is not only solid, but it's big and smooth? A. Well, naturally, that is smooth. That is cut with a fine saw.

Q. Now, the part that you say is rotted is solely this part that is underneath the place where the end of the iron band was. Isn't that so? A. I say it's rotted all through, all over.

859 Q. So you say that there are parts in addition to the parts where the iron band was that were rotten.

Q. I want you to show me one such part away from that. A. That is rotted?

Q. One such part, not the same. A. All right.

The Court: You may stand up.

A. This is where the iron was?

Q. Yes. That's where the iron was. A. Right here.

860

Mr. Parmer: Come down, so we can see it.

The Court: Let the record show the witness tried at one place, tried a second place, and finally a third place. He finds a place that he says is rotten.

By the Court:

Q. That is correct, is it? A. Yes, sir.

By Mr. Parmer:

861

Q. Will you show us where that was, because you were a little too high for my eyes. A. You don't mind if I keep picking again till I find it?

Q. We want you to pick till you succeed or say you cannot.

The Court: Let the record show what the witness is doing, Mr. Parmer.

Mr. Parmer: The witness is examining the wood at various places again, looking for such a place.

862 A. It's rotted here (indicating), rotten in here.

Q. Wait a minute. A. First, one moment, please.

Q. Just a minute. The first place that you picked out was the place where it had been sawed, right here? A. No.

Q. Don't be so fast the next time. A. I had it up here. You couldn't see it. I am going to pick the pieces off here. You can mark it off. You can mark it off.

Q. Mr. Witness, you are now at the place where
863 the iron was. The question asked you was to go some place where the iron was not. A. I am going to show it was just rotten anyway. You can mark it off any place you want.

Q. Mr. Witness, I don't want to be severe at all, but would you mind attending to the question? We have been over the place where the iron was. Now I want you to go to a place where the iron was not. A. You want me to find another spot?

Q. That is what you said you were going to do. Isn't that what you said you were going to do? A. Not necessarily.

Q. Oh, well— A. Now, wait a minute. Don't
864 you want me?

Q. Maybe I misunderstood you. A. You want me to find another spot?

Q. Just one more spot where—from where the iron was that it was rotten. A. Just one moment. I am up here examining this too, you know, right here.

Q. You are now at the place where the iron was? A. Not right here. The iron is over here.

Q. Point it out to me. Never mind picking out a part. Now, you are pointing to something now

that you say is rotten, is that right? A. Partly rotten, yes. 865

Q. Why do you say it's partly rotten instead of wholly rotten? A. I will tell you why, just a moment, please,—partly rotten, there's a certain amount of this wood that that's good yet in here; 50 per cent of this wood, the tensile strength of it was there. 50 per cent was gone due to the deterioration.

Q. All right. What I want to know is what you have got to say about this wood you are pointing at. A. It's dry rot. 866

Q. Right here where I am pointing now? A. Yes.

Q. Let us mark it— A. Go ahead.

Q. —so we know what you are talking about. Put a little circle around it. Put it any place. A. Do you want me to mark other places where it is rotten?

Q. We will take one at a time, if you don't mind, so we know what we are doing. This place is surely rotten in your opinion, the part within the circle? A. I wouldn't say the entire circle. You drew a bigger circle than the part I broke out, but that is all right. Go ahead. Leave it go that way. 867

Q. Within this circle is the rotten part? A. Part of it. I don't say that is the only spot on there that is rotten. Now, remember that.

Q. At this point—what I mean is this—at this point here where we have got the circle,— A. Yes.

Q. —within it is a rotten part? A. Within it, yes.

Q. Do you notice that the wood has been

868 crushed at that point? A. I don't care whether it's crushed or not. I still say it's rotten.

Q. I asked you, did you notice it? A. Yes.

Q. Can you dig anything out of there with your fingers? A. I took a piece out for you before.

Q. I want you to come down and do it. A. I don't want to break my nails all part.

Q. I want you to come down now and do it before the jury. A. You are going to make me pick out a piece at that particular spot? Is that the idea?

869 Q. Yes. Do you see right there? A. Yes.

Q. Is that a rotten part? A. You want me to pick a piece out?

Q. I am asking you a question. A. I am not going to pick it out where your finger is. I am going to pick it out within the circle.

By the Court:

Q. Where counsel's finger is, is that the one? A. He has got a circle twice as big as his finger.

Q. Where he puts his finger, is that the rotten part? A. Right here is rotten.

870 Q. Where he holds his finger now, that is the rotten spot.

By Mr. Parmer:

Q. That is the rotten spot? A. What do you want me to do?

Q. Can you pick that out with your finger? A. No, I can't.

Q. Can you demonstrate that that is different in condition than any other part within the circle? A. Yes, I can.

Q. How are you going to demonstrate it? 871

Mr. Fisch: There.

A. Just one moment. There you are.

Q. You picked out a small piece. A. I picked a piece out where you asked me to pick it out.

Q. Can you pick out another piece? A. I am through picking out. My nails hurt. After all, my finger is not a tool.

Q. That's right. Now,— A. You pick a piece out too.

Q. Look here. I know I have picked out a piece. 872
That's true. I want to show you something. A. All right.

Q. Do you notice that much of the wood here is broken? A. Regardless.

Q. I asked you whether it was crushed before and you said it was. Do you notice that much of the wood is broken? A. It has been knocked around, certainly. It has. You can see it.

Q. Now, do you say that the broken and crushed parts of this wood are the same as the rotten? A. My contention is—

Q. Do you say that? A. Counsel— 873

By the Court:

Q. Cannot you answer the question yes or no? A. I don't know what he means.

By Mr. Parmer:

Q. Did you say that the parts of this wood that are broken and crushed are the same as you mean when you say that the thing is rotten? Is that

874 what you mean? A. The piece that I picked out was part of the rotten part.

Q. That is not an answer to my question. A. That is the way I interpret it.

Q. You said that a lot of these pieces in here are broken and crushed. A. That's right.

Q. Yes. Are those the pieces that you mean? A. The piece I picked—

Q. Listen, please. Are those the pieces that you mean that are rotten? A. No. No. No.

Q. You know there is a distinction between that then, between rotten and broken and crushed, 875 don't you? A. Yes.

Q. Now, you saw the place where I picked out a piece. Isn't that broken and crushed? Look at it, please. A. Not the piece I picked out, was not broken and crushed.

Q. I am asking you about one I picked. A. I wouldn't say yes or no on that.

Q. Will you look at that piece? A. I didn't see you pick that piece out. I don't know whether it was laying there or not. I couldn't answer that question.

Q. I thought you said it to the jury, that you 876 saw me pick one out. A. I wouldn't be fair in answering that question.

Q. All right. You must be fair. A. I am going to try to be fair.

Q. That's right. Do you see any broken and crushed pieces here? Do you see them? A. Just one moment. I have got to find out if they are loose or broken.

Q. I asked you if you can see any. A. I don't see any right now, outside of a little piece that is broken. How can I tell?

Q. Do you see that piece in there? A. I see that piece. 877

Q. Don't you see that it's broken or crushed? A. That little piece?

Q. Inside there? A. It might be—there's a possibility—but I can't tell whether it's fastened on the bottom or not.

Q. Do you see that there, there is a piece that has been broken and crushed? Isn't it? A. You don't have to break it. How am I going to tell?

Q. I am pointing to it. A. I want to see if it is loose. 878

Q. Look here. I am just touching it now. See how loose it is? It's a part that has been broken.

By the Court:

Q. Is that broken or crushed? A. It's loose in there. Naturally, that piece is loose.

Q. Was it broken or crushed? If you don't know, say you don't know.

By Mr. Parmer:

Q. Was it broken? A. The chances are, when this boom was broken— 879

Q. Aren't there many such pieces that you see there of that character? A. Yes. There are little splinters. If you look all over, you might be able to dig out a few pieces.

Q. Do you see that one moving in there now, when I touch it? A. That is right.

Q. Do you see right here a place where you picked out the piece? A. I didn't. Are you positive I picked it out there?

880 Q. Do you see the circle? A. Yes.

Q. The red circle still there? A. Yes.

Q. Now, do you see in the center of the circle the place that you did pick out that piece, a number of other small grain pieces? A. No, sir.

Q. Just one moment now, we will pick them out. A. Suppose that piece was, that little piece might have fell down when I broke it out.

Q. Just a moment. We will see about it. Do you see them coming out? A. Listen, counsellor, you might be breaking them out, I don't know.

881 Q. You can see what I am doing. A. I don't know that. I see one piece, but you are breaking it more.

Q. You have got a little pencil there? A. Certainly, I can—

Q. It's a probe, look at it, working. See it coming out? A. Certainly. It's due to the fact that it's rotted. You have got a little pencil there. Take it out all over the place where it's rotten.

Q. In other words, this place where it's broken, it is rotten, but this place where it's broken, it is broken? A. I told you there's a certain amount of good wood in there that has not deteriorated

882 as much as the other. Now, if—I am a carpenter.

Q. Yes. A. This is a piece of pine.

Q. Yes? A. You will notice here, all these circles—

Q. Yes? A. —there is a certain amount of sap left in that yet. You don't see and I don't see, you smell it; you smell it. This end, that sap, has deteriorated.

Q. You mean there isn't so much of it? A. That's right, due to the weather. I just want to explain what dry rot is to you. After a period of years,

this deterioration, this wood dries up thoroughly, 883
and each time it dries out, has a certain amount of rotting. That is why we call it dry rot.

Q. Do you mean—

The Court: Any further questions that you want?

Mr. Parmer: Just one or two and I am through.

Q. Do you think that because the wood is dry, it means it's dry rot? Is that the idea? A. Not 884
necessarily, no, because—

Q. Do you know? A. You cannot build a house with green lumber.

Q. How long ago do you think this accident happened? A. This accident happened—I don't even know, I tell you the truth.

Q. Well— A. The chances are it was mentioned in court, but I didn't pay no attention to it.

Q. Assuming it was January 27, 1944, and this piece of wood has been ashore ever since. A. Yes, sir.

Q. You might expect it to be somewhat dry by now? A. Wouldn't be any drier than the day it 885
was taken out, outside of the period of time that would take that certain amount of deterioration that would apply just the same as it did previous in the form of dry rot.

Q. Never mind about dry rot. It might be a little dryer than when you took it off the ship, don't you think? A. Well, not so much. There would be, as I told you before, the deterioration in all wood; no matter how old it is, as you go along each year, it deteriorates.

886

Q. Yes. Thank you very much. A. Don't ask me to tell you how much deterioration there is there in one year, because I couldn't do it. I am not smart enough.

Q. I am not going to ask you to. Thank you very much.

The Court: All right, you may take your cap, Mr. Steuerwald.

(Witness excused.)

887

The Court: Both sides rest? You rest, Mr. Parmer?

Mr. Parmer: I rest, your Honor.

The Court: Both sides rest. All right, motions.

Mr. Parmer: I renew the motions made at the end of the plaintiff's case, especially the second portion thereof. I think the first portion of it was based upon a failure to prove regulations, your Honor. Since they

888

have been proved, I am not so sure that it is relevant; but I move to dismiss the complaint and for a directed verdict on the ground that the plaintiff has failed to prove any cause of action against these defendants.

There is no evidence in this case that the defendant violated any duty it owed to the plaintiff. There is no evidence in this case that these defendants owned or controlled

or operated the vessel on which the accident happened. There is no evidence that they were the occupier of the premises on which the accident happened. There is no evidence that they supplied the appliances which it is claimed were defective and therefore caused the accident, that is, that they supplied them to this plaintiff for use by him. There is no evidence that these defendants invited the plaintiff to come on board the vessel; indeed, the evidence is to the contrary, that he came on board the vessel by reason of his employment by Jarka and that Jarka got its contract from the W.S.A. directly, and that the W.S.A. undertook to supply the equipment in sound condition, all of which this defendant had nothing to do with. 889 890

I also move to dismiss the complaint on the ground that even as respects any duties which these defendants had to the United States, there has been no evidence that there has been any breach thereof or failure on their part to perform their duties owing to the United States, and if there is no such evidence, it cannot be the foundation of any recovery against this defendant, because such duties were not owed by these defendants to the plaintiff. They were owed solely to the United States. 891

The Court: You also move on the ground that there is no proof of any misfeasance?

Mr. Parmer: Yes. In substance, I had intended to say that. I move to dismiss on the ground that there is no proof of any misfeasance on the part of this defendant and that the so-called nonfeasance—

892 The Court: —does not render the defendant liable to third parties.

Mr. Parmer: That is right.

The Court: I will reserve decision.

Mr. Parmer: Exception.

The Court: All right, ladies and gentlemen of the jury, we will recess until Monday, at 10 A.M. The evidence is now in. On Monday you will hear summations of counsel and the charge of the Court.

Do not discuss the case among yourselves nor permit anybody to discuss it with
893 you, and do not visit the scene of the accident. Ten o'clock Monday morning.

(Whereupon an adjournment was taken to Monday, June 11, 1945, at 10 A.M.)

Monday, June 11, 1945.

TRIAL RESUMED.

894 (Same appearances.)

Mr. Parmer: It is stipulated by and between the attorneys for the parties hereto that all of the orders, written orders and regulations, issued by the War Shipping Administration previous to the happening of the accident may be considered as in evidence in this case whether or not the physi-

cal papers have actually been brought to court and marked herein. 895

The Court: It is stipulated by and between the attorneys for the parties hereto that the life expectancy of the plaintiff is 21.63 years.

Mr. Parmer: Agreed to.

The Court: Whenever you are ready, gentlemen, you may sum up.

(Mr. Parmer summed up to the jury in behalf of the defendant.)

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The Court: Let the record show that Mr. Parmer consumed one hour and one minute, and you may be guided accordingly, Mr. Fisch.

(Mr. Fisch summed up to the jury in behalf of the plaintiff.)

The Court: Let the record show that Mr. Fisch consumed 54 minutes.

CHARGE TO THE JURY. 897

The Court: Members of the jury: The plaintiff, Peter Caldarola, brings this action against the defendant Thor Eckert & Company and he says that Thor Eckert & Company owe him money as a result of their negligence.

He says the particular negligence which caused his injuries was that on January 27, 1944, the starboard boom on the exhibit which has been offered in evidence here fell and gave way; and that the

reason for it falling and giving way was that the
898 defendant failed to use reasonable care in making a proper inspection and in furnishing proper ship's equipment, and to remedy any defect or danger which an inspection would show. The defendant denies this claim of negligence. So there you have an issue for you to decide.

Let us see what negligence is, because that is the basis for the plaintiff's complaint. Negligence is nothing more nor less than carelessness, the failure to do something that an ordinarily prudent person would do under similar circumstances.
899 Want or absence of due care, that is all negligence consists of. When I define negligence, the same definition is true with reference to contributory negligence. It means carelessness which assisted in bringing about the happening of the accident, want of due care which assisted in bringing about the happening of the accident.

When the plaintiff brings this type of a case, the law imposes a burden on him of establishing his case by the fair preponderance of the credible and believable testimony. In other words, to explain that legal verbiage, the law imposes a burden on the plaintiff to make out a better case than the defen-
900 dant. When the case starts out, the scales of justice are in even balance. If at the conclusion of the case the scales are in even balance, in other words, if you cannot make up your mind as to who has the right of the case and who has the wrong of it, then your verdict must be for the defendant. If at the conclusion of the case the scales are down ever so little in favor of the defendant, again, your verdict must be for the deendant. It is only when, at the conclusion of the case, the scales are down in favor of the plaintiff by the fair preponderance

of the credible and believable testimony, then and only then is the plaintiff said to have sustained the burden of proof. Then and only then is the plaintiff said to have made out a better case than the defendant. The plaintiff has the burden of proof of establishing the negligence or carelessness of the defendant and also of establishing the issue as to whether he himself was free from contributory negligence or not, because under our system of law and procedure, if the plaintiff contributed to the happening of this accident in any manner, shape, or form, no matter how small the degree, he is not entitled to recover. He must establish by the fair preponderance of the credible and believable testimony that he, the plaintiff, was free from contributory negligence or carelessness, and that the accident came about wholly and solely as the result of the negligence of the defendant that he sues herein. Now, on those issues, he has the burden of proof. 901 902

He also must show that his hurts came about and were the proximate cause of the accident. What do we mean by proximate cause? I am going to put it in fairly simple language. You have often heard the expression "but for". Proximate cause is one but for which the accident would not have happened. You may say to yourself, "But for the fault of the defendant, would this accident have happened?" Now, if the answer is one way, that will assist you in arriving at a verdict. If it is the other way, it will assist you in arriving at the opposite verdict, because the negligence must be the proximate cause of the happening of the accident; and if it is not, that is the end of the case. If it is, that is another element that the plaintiff is called upon to establish, and if he has established 903

that element, as well as the carelessness or negli-
904 gence of the defendant and his freedom from contributory negligence, then you may pass on to the question of damages. We will come to that in a few moments.

In setting up the question or the contentions of the various parties, it may be that I will refer to the evidence. When I refer to the evidence, I do not do so because I want to call your attention to a particular bit of evidence. I do not want you to think that I consider that particular bit of evidence more important than some other bit of evidence
905 that I do not mention. I want to caution you that, in referring to the evidence, if your recollection of the evidence differs from mine, it is your recollection that controls and not mine, because you are the sole judges of the facts. So, bear that in mind. I only refer to the evidence in assisting you to set up the various contentions of both parties, so that you may more readily solve the questions of fact which I am passing on to you to solve. I reiterate, bear in mind the caution that I have heretofore given you: If I refer to any evidence and your recollection is different from mine, it is your recollection that controls and not mine. The same is
906 true with regard to any reference made by the attorneys to the evidence in the case. If your recollection is at variance with either or both of the attorneys with reference to the evidence, it is your recollection that controls and not theirs.

The claim asserted by the plaintiff is a simple claim, as I understand it. He says, "My claim in this case is that I, the plaintiff, was injured through the negligence or carelessness of the defendant and that the negligence consisted in failing to inspect and thus discover a weak and un-

stable boom, the defects of which could have been discovered by the exercise of reasonable diligence or care; in failing, after inspection and discovery, to replace or renew this weak and unstable boom. 907

The defendant's claim, as I understand the defendant's claim, as has been advanced through the evidence offered here, is that the plaintiff's injuries were due to the fault or negligence of a fellow employee who fouled up the tackle, as has been explained to you, or to the fault of the War Shipping Administration, or for some other cause over which the defendant has no control and which is not chargeable to it.

I have already told you what negligence is. Let us see what is the basis for the plaintiff's claim. The basis for the plaintiff's claim is the general agency agreement which has been offered in evidence here. On that proposition, it is my duty to instruct you what the law is. When a contract is not ambiguous, it is the duty of the Court to instruct the jury with reference to the contract. Inasmuch as the basis of plaintiff's claim is this contract, I am now going to charge you what I say the contract means. This is not the ordinary case of negligence, because the defendant does not have the whole control of this vessel. The defendant's control of this vessel is limited by this general agency agreement and the rights and duties of these parties are accordingly so limited. You will have to decide this case within the limitations of the general agency agreement, and I propose to tell you what it means. With reference to the general agency agreement, Article 14 of that agreement—and I base my ruling of limited control on that article as well as other articles of the agreement to which I will refer in my charge—Article 908 909

14 of that general agency agreement, in substance
910 and effect, states as follows: It prescribes that the defendant shall arrange for the repair of the vessel covering the hull, machinery, boiler, tackle apparatus and equipment, and spare parts, and including the maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessel in a fairly efficient state of repair and condition.

It further prescribes that the general agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessel
911 and shall advise the United States from time to time in order that the United States may satisfy itself that the vessels are being properly maintained, and shall co-operate with the representatives of the United States in making any inspection or inspections that the United States may deem desirable.

Under certain limitations, the defendant has some duty of maintaining the gear in a reasonably safe condition.

I charge you that in this case the Steamship Everagra is not owned or chartered by the defen-
912 dant. I charge you that the officers and crew were not the servants of this defendant, neither were they their employees.

I charge you that there is a certain duty of maintenance and repair of the ship's gear and its condition to be carried out by the crew of the Everagra. They are not the servants or employees of the general agent for that particular purpose. The masters and members of the crew of the Everagra were employees of the United States of America and the general agents are not responsible for the acts of the master, officers, and crew.

The defendant Thor Eckert & Company did not supply this boom for any of the vessel's equipment 913
to the plaintiff or to the other longshoreman employed by Jarka & Company; and as a matter of fact, the boom and the rest of the equipment of the vessel, which was the property of the United States, was supplied by the United States of America to the plaintiff and his fellow employees for their own use. This defendant had nothing to do with the supplying of this equipment. This defendant had no relations at all with the plaintiff's employer, Jarka & Company, and did not make the arrangements with Jarka & Company for the work that 914
the company was hired to do on this vessel. The matter of the loading or unloading of the Steamship Everagra at the time of the happening of the accident was entirely out of the hands of the defendant. With regard to such matters, it didn't even act as agents for the United States of America.

In considering the rights and obligations of these parties within the limitations of the general agency agreement, I charge you that the general agent was an agent and not an independent contractor. I charge you that the general agency agreement, Article 1 thereof, required the general agent to 915
manage and conduct the business of the vessel. The agency agreement did not require him to manage and conduct the vessel, but it did require him to manage and conduct the business of the vessel. You will find that in Article 1 of the general agency agreement.

On Article 2 of the general agency agreement, and it is in evidence here, the general agent agreed to manage and conduct such business in accordance with such directions, orders, or regulations

as the United States has prescribed and from time
916 to time may prescribe and upon the terms and conditions provided in the agency agreement. That is found in Article 2.

With respect to the crew, Article 3-A, subdivision D, provides that the general agent's only duty was to procure them. That was the duty which the general agent owed under the agency agreement.

The agent also, under Article 3-A, subdivision C, had a duty to equip, victual, supply, and maintain the vessels subject to such directions, orders,
917 regulations, and methods of supervision and inspection as the United States may from time to time prescribe.

Article 14, which I have already referred to, places a duty on the general agent or arranging for the repairs of the vessel as may be necessary to maintain the vessel in a thoroughly efficient state of repair and condition. This duty is imposed on the general agent subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States. In order to determine the extent of the agent's duty in this respect, it is necessary
918 to know something about the regulations, instructions, and what the methods of supervision and inspection are or were.

Article 14 also requires the general agent to exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels and to so advise the United States from time to time in order that the United States may satisfy itself that the vessels are being properly maintained.

That contract does not impose any duty on the general agent to make inspections and obtain information for the purpose of keeping the vessel in sound repair and sound condition. It merely requires the general agent to make the inspection and furnish the information to the United States so that the United States may take such action in the premises as they deem fit and proper. 919

Under the general agency agreement, I charge you that the general agent is not given control of the vessel either by the contract or in fact, but that his control is a limited control. So far as the contract is concerned, the vessel remains within the control of the United States of America through the Master who is the agent and employee of the United States of America (Article 3-A, Subdivision D, of the general agency agreement). 920

I charge you that if the general agent were given control of the vessel under a contract which requires it to make repairs, and just that, there would be a different case from the case at bar. In that case, you would have a case where the general agent, by reason of the control of the vessel, would be the supplier of the vessel's equipment to the longshoreman. The equipment in this case was supplied by the United States of America. 921

Further, I charge you that the agreement between the United States and the general agents who are the defendants, placed upon the defendant a responsiblity to use reasonable care within the terms of the contract in inspecting, repairing, and replacing, when necessary, the ship's boom, so that it would reasonaby fit and safe for the work for which it was intended. The boom which was in use at the time of the accident was part of the ship's equipment. I so charge you.

I charge you that if the jury should find that
922 the plaintiff was free from any negligence contributing to the happening of the accident and should the jury further find that the manner in which the longshoremen were doing their work did not contribute to the happening of the accident, but that the boom was defective, and that the defendants failed to use reasonable care in inspecting, repairing, and replacing the boom, within the terms of the contract, and that such failure to inspect, repair, and replace the said boom was the proximate cause of the accident, then the plaintiff would be
923 entitled to a verdict against the defendant.

I also charge you that if the jury should find the plaintiff free from negligence contributing to the happening of the accident and should the jury further find that the negligent acts of the longshoremen, other than the plaintiff, combined with the negligence of the defendant in failing to inspect, repair, and replace the boom, within the terms of the contract, the plaintiff would then be entitled to a verdict against the defendant, as the plaintiff has a right to recover against one or more joint tort feasors.

I also charge the jury that if the jury should
924 find the plaintiff free from any negligence which contributed to the happening of the accident and if the jury should find further that the defendant was negligent and that the manner in which the longshoremen performed their work was also negligent and that the negligence of the defendant and the negligence of the longshoremen, other than the plaintiff, combined to produce the injury to the plaintiff, then the fact that the plaintiff's employer has not been brought into court as a party defend-

ant will not operate to discharge the defendant, as the injured party may sue one, any, or all wrong- 925
doers.

If the jury should find that an inspection of the boom was made prior to the happening of the accident, but that such inspection was not efficiently made, within the terms of the contract, and that the boom was defective at the time of the inspection, then the jury may find the defendant guilty of negligence in failing properly to inspect and replace the boom, within the terms of the contract.

I charge the jury that the master and all of the officers and members of the crew of the Steamship 926
Everagra at the time of the accident were employees of the United States of America; that neither the master nor any officer or member of the crew of the Steamship Everagra at the time of the accident was an employee of the defendant, and the relationship of master and servant did not exist between the defendant and such persons. The defendant is not liable to the plaintiff for any act or for any failure to act on the part of the master or for any officers or members of the Steamship Everagra, whether such act or failure to act was negligent or not.

I charge the jury that at the time of the accident 927
and during all the times that the plaintiff was on board the Everagra and up until the time of the accident, the Steamship Everagra was not owned by nor in the possession of the defendant; that the plaintiff came on the vessel and was on the vessel at the time of the accident solely by reason of the invitation of the United States of America, which owned and possessed the vessel; that this defendand did not invite the plaintiff to come on board the vessel nor to be there at the time of the accident

or any time prior thereto; that the plaintiff was
928 not the business invitee of this defendant while he was on the Steamship Everagra and therefore this defendant did not owe to the plaintiff the duty of exercising reasonable care to have the premises, that is, the boom, in safe condition so far as that duty would arise from the relationship of an occupier of the premises and a business invitee.

I charge the jury that the United States supplied to the plaintiff the boom and other equipment, which the plaintiff was using at the time of the accident for use by the plaintiff in the performance
929 of his work. The defendant did not supply the boom and other equipment to the plaintiff for use by him in the performance of the work at the time of the accident and the defendant therefore did not owe to the plaintiff the duty of exercising reasonable care to have the boom and other equipment in safe condition so far as that duty would arise between the parties if the defendants had supplied the boom and equipment.

The defendant did not have any power or authority to prevent the plaintiff or anyone else from coming on board the vessel previous to the accident, nor any power or authority to remove him
930 or anyone else from the vessel at any time before the accident. Pursuant to the requirement of the United States of America, the only agents of the United States who were caring for the interests of the United States in connection with the Steamship Everagra, while the plaintiff was on board her, were the berth agents Moore-McCormack Steamship Company who arranged for placing the vessel at the pier where it was and also arranged for the discharge of the cargo.

I charge the jury that it is for the jury to say, under all the facts and circumstances in the case, and bearing in mind the general agency agreement, whether the general agent's duty of inspection went no further, under the evidence in the case, than to receive information from the ship's officers as to those parts of the vessel which needed repair, to verify such information, and to transmit said information to the United States of America. I say that is for the jury to say under all the facts and circumstances as to whether or not that is what a reasonably prudent person would do under the circumstances. If you say that a reasonably prudent person under the circumstances, and under the limited control as evidenced by the general agency agreement, if you say that a reasonably prudent person under the circumstances, whether it would be enough for that reasonably prudent person to accept the reports of the ship's officers with reference to inspection and what was necessary to repair, if you feel that is what an ordinary prudent person would do under the circumstances, that is the end of the case. Bring in a verdict for the defendant. If you feel that an ordinarily prudent person should go further and make inspections himself under the terms of the general agency agreement, that is for you to say. That is a question of fact which I pass for you to solve.

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In performing the duties of inspecting the vessel in order to ascertain what part of it was in need of repairs, I charge you that the officers and members of the crew were acting solely as agents and employees of the United States and were not acting in any way for these defendants.

I charge you that under the evidence in this case
934 this defendant, as general agent, had no obligation with respect to repairs of the vessel other than to arrange with some independent contractor to make repairs when they were under $10,000. I say it is for you, the jury, to decide as a question of fact as to whether or not the defendant in this case in the exercise of ordinary care and prudence would inspect and order repairs other than the repairs evidenced by a requisition to the defendant, made at the close of a voyage, by the master. In other words, in the exercise of ordinary care and prud-
935 ence, should the agent take the master's requisition and should that discharge the agent from liability in the exercise of ordinary care and prudence? If you believe it should, that ends the case and you are entitled to bring in a verdict in favor of the defendant. If you believe the agent should go beyond the master's requisition and send somebody on to make an inspection for his own satisfaction, then you may say that the agent has not lived up to the terms of the general agency agreement; and on that, you may predicate a finding of carelessness or negligence, and find for the plaintiff.

936 I say it is for the jury to say under all the facts and circumstances and in view of the limited control as evidenced by the general agency agreement whether the defendant should make an independent inspection of the vessel to discover any defects which may have been overlooked by the officers of the vessel and omitted from the requisition for repairs prepared by the officers. That is for you to say, and that is a question I am passing to you for your decision as a question of fact. Should the general agent take the requisition of the officers?

Should the general agent make an independent investigation, to satisfy itself? That is for you to say, what should be done under the rules I have already given you. The rule that you should apply in determining what should be done is, What would a reasonably prudent person do under the same circumstances or similar circumstances? Would the reasonably prudent person take the master's requisition, or send some of his own employees on to make an inspection? That is for you to say. 937

I charge the jury that the privilege that the defendant had to go aboard the vessel for inspection, so that they could later arrange for repairs, had no bearing upon the question of control. The privilege which the defendant had to go aboard the vessel for inspection so that they could later arrange for repairs is not in and of itself sufficient to establish control of the vessel by this defendant. The defendant did not have any authority to instruct the officers and crew not to permit the stevedores, including the plaintiff, to use the boom which it is alleged caused the accident. This defendant did not have any authority to instruct the longshoremen, including the plaintiff, not to use the boom which it is alleged caused the accident. 938 939

There is no evidence in the case that the defendant ever received any actual notice from the officers of the ship or from anyone else before the accident happened that the boom was not in good and sound condition. The fact that the general agent was required by the contract and therefore did go on board the vessel from time to time in the performance of services for the United States is not in and of itself sufficient to establish control of the vessel by this defendant. The fact that pur-

suant to the general agency contract this defend-
940 ant was obligated to and did transmit orders from the United States to the captain and members of the crew from time to time is not in and of itself sufficient to establish control of the vessel by this defendant. The fact that this defendant was required by the general agency contract and therefore did give instructions to the master and officers of the crew of the Steamship Everagra from time to time is not in and of itself sufficient to establish control of the vessel by the defendant. The fact that the general agency contract required the de-
941 fendant to perform for the United States services mentioned therein and that the defendant performed those services is not in and of itself sufficient to establish control of the vessel by the defendant.

I charge you that under the evidence of the case you can find that, preceding the happening of the accident on January 27, 1944, the repairs required on the Everagra as evidenced by the master's requisition, amounted to more than $10,000. I charge that under the terms of the general agency agreement and the orders and regulations issued pursuant thereto, the matter of arranging for all repairs on the vessel was in New York subsequent to said voyage and up to and including the time of
942 the accident was reserved by the United States to itself and this defendant did not have any duty to arrange for any repairs at that time, because the repairs as evidenced by the master's requisition exceeded $10,000. That is the law of the case, as evidenced by the general agency agreement.

I have taken a long time to charge you, because it is very involved and intricate. I do so only for the purpose of assisting you to decide the questions of fact in the case, which I limited by reason

of the general agency contract. That is my duty, to instruct you as to what I think the agency contract means, and it is your duty to solve the questions of fact in keeping with the instructions that I have given you. 943

If you find that the plaintiff has sustained the burden of establishing the negligence of the defendant and that he, the plaintiff, is free from contributory negligence and that the negligence of the defendant was the proximate cause of the accident but for which the accident would not have happened, then you may pass on to the question of damages. Because I charge you on the question of damages, I do not want you to get the idea that I think you are going to give any damages in this case. I have no such opinion, it is not part of my province; but it is an issue which comes into a case of this kind and character, and it is the duty of the Court to charge you on every issue involved in the case. Therefore, if you find for the plaintiff on the issues which I have already discussed, you are entitled to come to the question of damages. When you come to the question of damages, you are entitled to award this plaintiff such compensation as you think would satisfy him for the hurts that he received, the injuries that he received in this accident. 944 945

You are entitled to take into consideration his pain and suffering, if you believe he had any pain and suffering; his out of pocket expenses, that is, his loss of wages, if you believe that he has lost wages as a result of the hurts that he received in this case. You are entitled to take into consideration his out of pocket expenses, whether he paid the doctors and hospitals; whether he paid them or not, you are entitled to take into consideration

the fact that he is obligated to pay the doctors.
946 There is no testimony in the case, as I recall it, that there was any obligation to pay the hospital bills. There is no proof of the hospital bills in the case, but there was a doctor here who testified, Dr. Patella, and as I recall it, and it is your recollection that controls, there was a four or five hundred dollar bill due and owing to him.

There is a sharp dispute in the case with reference to injuries. The plaintiff says he was hit by this boom. He told you about being in the hospitals. He says in substance and effect, "I have never worked since." His doctors say, in substance
947 and effect, that that is due to a condition known as post concussion syndrone or, as the second doctor described it, traumatic neurosis. The doctors say that is a condition of nerves or a brain condition, that it's real as far as the plaintiff is concerned; and that he cannot work by reason of the condition.

The doctor called by the defendant, who examined him, says, "No such thing." He says, "I went all over the man neurologically. I cannot find any evidence of any neurological manifestations whatsoever. The man is a sick man. He
948 has had diabetes for years. The only thing I can find about him objectively is some diminution of his hearing that did not come about as a result of the accident." He says that his reflexes—you recall he told you how he tested the reflexes—"I find some lessening of the reflexes, but that could come about as a result of the diabetes."

So you see you have an equally sharp conflict on the question of hurts and injuries as well as an equally sharp conflict on the question of negligence or carelessness. That is for you to say under all the facts and circumstances.

With reference to the expert witnesses in the case, there have been a number called. They have called medical witnesses and both sides have called experts with reference to the wood. With reference to expert testimony, I charge you that you may properly weigh such testimony and that when such testimony is given in answer to a hypothetical question, its weight depends entirely upon whether or not the facts recited therein were established by the evidence. In all cases, it depends upon the knowledge, accuracy, and honesty of the witness; but the testimony of all the physicians and experts, whether with respect to what they have seen or observed, or with respect to their opinions on an assumed state of facts, is not to be rejected or accepted at will but is to be weighed and considered the same as any other evidence, you being of course at liberty, after weighing and considering such testimony, to believe it, if probable, or to disbelieve it, when it is improbable, or when it is discredited or disproved by other testimony in the case, or when you believe the witness testified falsely when he was examined with reference to any fact or opinion. 949 950

I also charge you too under the laws of the State of New York, ladies and gentlemen, if you believe that any witness has testified wilfully falsely to a material fact in this case, you must reject that portion of his testimony or her testimony which you believe to be false. As to the balance of his or her testimony, the law gives you an option. You may accept such portion of it as you believe to be true or you may reject the entire testimony. Apply the same test to that testimony as you would to an apple which you picked up from your kitchen table. If it has a spot on it, the spot 951

is the perjured testimony. Cut it out. Throw it
952 away. The law says you must do that. As to the balance of the apple, you may eat it or not as you see fit.

This case has taken a long time to try, ladies and gentlemen. It is a very important case. It is important for the plaintiff; it is important for the defendant. You have taken an oath here to decide this case fairly, without fear, favor, bias, prejudice, or sympathy, and that you must do. When you do that, in keeping with your oath as jurors, then you have discharged your duty toward
953 the parties in this case and to the Court and the Commonwealth of the State of New York which brought you in here to serve as jurors in this cause.

I think I have told you everything that you need to know to consider the case. I want you to take the case and I want you to work even justice between the parties in keeping with the instructions that I have given you and in accordance with the testimony which you gleamed from the mouths of the witnesses and from the exhibits.

If you wish the exhibits, notify the court officer and I will have the exhibits sent to you.

First of all, are there any exceptions to the main
954 charge?

Mr. Fisch: Yes, there are.

The Court: Very good, sir.

Mr. Fisch: Does your Honor want me to state them now?

The Court: State them now.

Mr. Fisch: We except to that portion of your Honor's charge to the jury wherein your Honor in substance or in effect left it to the jury to determine the duties on the part of the defendant as that, we contend, is a question of law for the Court.

The Court: In what particular respect do you say I left any duty? I agree with you, Mr. Fisch, as far as the contract is concerned, I must charge the jury what the contract meant, and I felt that I have done that. If you can point out specifically where I am in error, I will be glad to correct myself. 955

Mr. Fisch: Yes. I am coming to that. I except to that portion of your Honor's charge wherein your Honor stated that the plaintiff was not an invitee of the defendants.

I except to that portion of your Honor's charge where your Honor stated that the defendant owed no duty to the plaintiff, in words or in substance. 956

I except to tthat portion of your Honor's charge where your Honor states in substance or in effect to the jury that the employees, when making an inspection of the equipment, were not the employees or the agents of the defendant.

I except to that portion of your Honor's charge when your Honor stated in substance and in effect that the United States may take such action with reference to the repairs as it deems necessary, and I ask your Honor to charge the jury that (Exhibit 8) it is the duty of the agent to arrange and see to it that the repairs are made and to hand out bids for the same. 957

I ask your Honor to charge the jury that under the contract it is not enough for the agent to take the reports of the crew or the master, he cannot delegate his duty, that the contract places upon him to see it and inspect all repairs and replacements, and merely accept the word of the master that everything is O. K. or all right.

I except to that portion of the charge wherein your Honor stated in substance or in effect that the

repairs on his voyage amounted to over the sum of
958. $10,000; and in that connection, I ask your Honor to charge the jury that, in Exhibit 8, irrespective of the amount of the repairs, it is for the agent to arrange for them. It is for the agent to give out the contracts for them. It is for the agent to see that the work is being completed in accordance with, of course, the regulations of the War Shipping Administration.

I except to that portion of your Honor's charge where your Honor left it to the jury to say whether the jury should accept the evidence the fact or the
959. proof that the master would report to the agent that everything is all right or whether it was the duty on the part of the agent, within the terms of the agreement, to have gone aboard the vessel and to satisfy himself that the equipment was in good condition. In that connection, I ask your Honor to charge the jury that the agent could not delegate his duties of performance under the contract to anyone else, and that if it did delegate that duty to anyone else, the agent, in that limited sense, would be responsible for the failure of any other person who was doing the work for the agent to make repairs, to make a proper inspection, and ar-
960. range for repairs and replacements.

We except to that portion of your Honor's charge to the jury where your Honor stated that the crew or the War Shipping Administration was in control of the operation of the vessel; and in that connection, we say to your Honor that the plaintiff's claim is not based at all upon the operation of the vessel. It is based only on the duty that the agent has under the contract to make, to arrange for repairs, to make inspection and replacement.

Charge to the Jury.

The Court: I so charge as you requested in the last. I think I have told that to the jury. 961

In connection with your exceptions, at this time, I will let my main charge stand, but I will charge the jury that, pursuant to Plaintiff's Exhibit 8, which is in evidence here, repairs to be ordered by general agent, that in instances where vessels owned by or under bare boat charter to the United States and assigned to the general agents under service agreements with the War Shipping Administration require repairs (other than structural changes, arming, degaussing, defensing and installation of convoy operating measures) involving the 962
expenditure of not more than $10,000 in respect to any one voyage, the general agents shall arrange for and order the performance of such repairs without prior written approval of the local manager, Maintenance and Repair Division. However, general agents shall promptly notify, and obtain written approval from, the local manager, Maintenance and Repair Division, whenever it becomes apparent that actual expenditures will exceed the prescribed limitation of $10,000. And that, subject to the foregoing, general agents shall determine the repairs necessary; arrange with the Coordinator for ship repairs and conversion for designation of 963
the shipyards which are to perform the work; arrange with local manager for drydocking and other surveys, and for inspectors to view the work when the cost of repairs may exceed the prescribed limit; prepare and submit specifications in sufficient detail to describe fully the work to be performed, forwarding a copy to the local manager. Specifications must show the classification of the work, such as hull, engine, steward's department, insurance and improvements. Place in hand and award con-

tract for repairs. Supervise to completion, irre-
964 spective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Society and Bureau of Marine Inspection and Navigation, and approved changes and improvements; obtain completion certificates, signed by a representative of the general agent, the master or chief officer, and chief engineer, showing that the repairs have been completed.

General agents are to award the repairs subject to the terms of the current basic (master) contract in effect between the contractor and the War Ship-
965 ping Administration, or, in the absence of a holder of a basic contract for such repairs as required, the general agent shall award the repairs on a cost plus fixed fee basis, provided the fixed fee does not exceed seven per cent of the cost, based on an estimate made by the general agent before work commences, and the form of contract conforms, as far as practicable, to standard forms of contract approved by the Administrator.

General agents shall make no structural changes in the vessel, and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance, first securing the
966 written approval of the local manager, Maintenance and Repair Division.

The payments for all repairs awarded by the general agents in accordance with this order are to be made by them directly to the repair contractors and charges therefor should be included in the voyage accounts.

Repairs to be ordered by the Maintenance and Repair Division: Specifications are to be prepared, and contracts awarded, by the Maintenance

and Repair Division, in accordance with basic (Master) contracts, or subject to the terms of a basic contract to be executed by the contractor by whom the repairs are to be made, in all instances involving the following categories: 967

Repairs to vessels owned by, or under bareboat charter to the United States and assigned to general agents under service agreements with the War Shipping Administration, involving the expenditure of more than $10,000. in respect to any one voyage, except in an instance where the general agents arrange for and order the performance of such repairs on the basis of estimates indicating that their cost will not exceed $10,000 and it later developes that the actual expenditures exceed that limitation. 968

Special service requirements, arming, degaussing, and installation of defense features.

Repairs to vessels owned by, or under bareboat charter to the United States but not assigned to a general agent under a service agreement, and repairs to vessels under time charter to the United States when such repairs are determined to have resulted from a risk assumed by the War Shipping Administration under such time charter.

The Payments for all repairs awarded by the Division of Maintenance and Repair, in accordance with this order, are to be made by the War Shipping Administration directly to the repair contractor upon receipt of properly executed public vouchers. 969

In connection with your requests to charge, Mr. Fisch, I have already charged requests 1, 2, 3, 4, 5, 6, and 7, with the exception that I interpolated in some of them "within the terms of the contract." I have refused to charge 8 and 9, except as I have otherwise charged.

Mr. Fisch: May 1, for the purpose of the record,
970 put in 8 and 9, please?

The Court: Certainly.

Mr. Fisch: Before I do that, there is one request the plaintiff would prefer to have charged, standing alone. May I have that exhibit, your Honor, Exhibit 8, please?

The Court: Are you still on exceptions, or are you going to requests?

Mr. Fisch: Requests.

The Court: You are through with exceptions. All right. Plaintiff's requests.

971 Mr. Fisch: There are really two small requests, very short. We ask your Honor to charge the jury that it was the duty of the defendants to supervise the completion irrespective of the amount to be expended on maintenance and insurance, repairs, including the requirements of the classification, Society and Bureau of Marine Inspection and Navigation, and approved changes and improvements.

I so charge. I have already charged it.

Mr. Fisch: Well, I just wanted to separate it. We ask your Honor to charge the jury that the payments for all repairs awarded by the general agent
972 in accordance with this order are to be made by them directly to the repair contractors and charges therefor shall be included in the voyage accounts prescribed in Fiscal Regulation No. 1.

The Court: I so charge. I think I have already charged it. I charge it again.

Mr. Fisch: This is the last request on this proposition. We ask the Court to charge the jury that it is the general agent's duty, that is, the defendant's duty, to place in hand and award contracts for repairs.

The Court: Let me see that. Just pick that out, will you, please? 973

Mr. Fisch: That would be "E".

The Court: I have already charged that and I charge it in connection with the entire paragraph, beginning with Paragraph 2. I will not divorce it from its context and charge it in just the language you request it, but I will tell the jury I have charged that in exactly that language, but in connection with the entire paragraph.

Mr. Fisch: May we then put the request—

The Court: Yes.

Mr. Fisch: —eight or nine, which your Honor 974
refused, on the record, after the jury retires?

The Court: Yes, you may.

Mr. Fisch: May we also request your Honor to submit that your Honor has now asked the jury to pass upon certain portions of the contract as to whether or not a reasonable person should or should not have done certain things as mentioned in the contract and submit both the contract and the Exhibit 8 to the jury?

The Court: I have not called upon the jury to interpret the contract. I know that is not the law and I would not do it. I have interpreted the contract. Now, what is the balance of your request? 975

Mr. Fisch: The request that, in view of the fact that your Honor has stated to the jury it's for them to say whether the jury should have accepted—

Mr. Palmer: Whether the jury?

Mr. Fisch: It is for them to say whether the agents should have accepted the reports of the Master as to repairs or whether they should have gone aboard the boat to make that inspection them-

selves. Your Honor left that to the jury as one of
976 fact. Under those circumstances, we ask your Honor to give both contracts, both the contract and the interpreted bulletin to the jury, because they cannot determine that question without a reference to the contract.

The Court: They are in evidence. I see no objection. Have you any objection to the exhibits being given to the jury, Mr. Parmer?

Mr. Parmer: I have no objection to those parts of the exhibits which deal with those matters, being given to the jury.

977 The Court: I am going to give both the exhibits to the jury. They are marked in evidence, and they may read them if they wish. If they wish them interpreted, they can ask me and I will interpret them further.

Mr. Parmer, I have already charged your Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. I refused to charge No. 12. I have refused to charge in the exact language No. 13. I have charged No. 14. I have charged No. 15 but modified it by dropping out the last three lines. I have refused to charge No. 16. I have charged Nos. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26. Take an exception to my refusal to charge as re-
978 quested.

Mr. Parmer: Yes, sir, I take exception.

I also except to your Honor's leaving to the jury as a question of fact whether there was any violation of duty on the part of the defendant in failing to go further than the requisitions which were or may have been prepared by the crew. I ask your Honor to decide that question as a matter of law and to charge the jury that, as a matter of law, there was no duty on the part of the defendant in that respect.

The Court: I refuse to charge as requested.

Mr. Parmer: Exception. 979

Then I ask your Honor to charge one more request. Even though the condition of the boom was not of the best and was not in what might be called good condition, if it were strong enough to lift the cargo without breaking, when the equipment was used properly by the longshoremen, and the longshoremen did not use the equipment properly and so caused the accident, there is no liability on the defendant.

The Court: I so charge.

Mr. Fisch: We respectfully except. 980

The Court: Ladies and gentlemen of the jury: I want to tell you this, that we like to have unanimous verdicts. If you cannot all agree, at any time that ten of your number have agreed on a verdict, you can notify me and I will have it recorded as the verdict of the jury.

One other thing. There has been a request here with reference to witnesses, and I charge you that the failure of a party to testify or produce evidence, within its control, does not permit any inference as to what the testimony would have been, but justifies the jury to take the testimony that is in the record most strongly against the party who is in 981 a position but fails to contradict it.

If you find a verdict for the plaintiff, you bring in a sum of money which you think will adequately compensate the plaintiff for his pain and suffering, for his hurts, for his out of pocket expenses—a verdict for the plaintiff, Peter Caldarola, in a sum of money.

If you find a verdict in favor of the defendant, all you have to say is, "Verdict for the defendant."

Take the case, ladies and gentlemen and work even justice between the parties.

PLAINTIFF'S REQUEST TO CHARGE

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1. The agreement between the United States and the general agents, who are the defendants, placed upon the defendants the duty to use reasonable care in inspecting, repairing and replacing when necessary the ship's boom so that it would be reasonably fit and safe for the work for which it was intended.

2. The boom which was in use at the time of the accident was a part of the ship's equipment.

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3. If the jury should find that the plaintiff was free from any negligence contributing to the happening of the accident, and should the jury further find that the manner in which the longshoremen were doing their work did not contribute to the happening of the accident, but that the boom was defective, and that the defendants failed to use reasonable care in inspecting, repairing and replacing the boom, and that such failure to inspect, repair and replace the said boom was the proximate cause of the accident, then the plaintiff would be entitled to a verdict against the defendants.

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4. If the jury should find the plaintiff free from any negligence contributing to the happening of the accident, and should the jury further find that the negligent acts of the longshoremen, other than the plaintiff, combined with the negligence of the defendants, in failing to inspect, repair and replace the said boom, the plaintiff would then be entitled to a verdict against the defendants as the plaintiff has a right to recover against one or more joint tort-feasors.

Plaintiff's Request to Charge.

5. If the jury should find the plaintiff free from any negligence which contributed to the happening of the accident, and if the jury should further find that the defendants were negligent and that the manner in which the longshoremen performed their work was also negligent, and that the negligence of the defendants and the negligence of the longshoremen other than the plaintiff combined to produce the injury to the plaintiff, then the fact that the plaintiff's employer has not been brought into court as a party defendant will not operate to discharge the defendants, as the injured party may sue one, any, or all wrongdoers. (From the opinion in the case of Wold v. Elder Dempster, 210 App. Div., page 4664.) 985 986

6. If the jury should find that an inspection of the boom was made prior to the happening of the accident but that such inspection was not efficiently made, and that the boom was defective at the time of the inspection, then the jury may find the defendants guilty of negligence, in failing to properly inspect and replace the said boom.

7. Where witnesses to an accident were equally available to be called as witnesses by either party, and were in court, the fact that neither party called them as witnesses does not raise any presumption that had they been called they would have testified in favor or against any of the parties. 987

8. The duty to inspect, repair and replace the boom when necessary rested upon the defendants and that duty could not be delegated by them to anyone else.

988 9. The duty to inspect, repair and replace the boom when necessary rested upon the defendants and if the defendants relied upon the others to perform that task, then the defendants would be liable for an improper inspection, repair and replacement of that boom.

DEFENDANTS' REQUESTS TO CHARGE

1. The Master and all of the officers and members of the crew of the steamship Everagra at the time of the accident were employees of the
989 United States of America.

2. Neither the Master nor any officer or member of the crew of the steamship Everagre at the time of the accident was an employee of the defendants, and the relationship of master and servant did not exist between the defendants and such persons.

3. The defendants are not liable to the plaintiff for any act or for any failure to act on the part of the Master or of any officers or members of
990 the crew of the steamship Everagre, whether such act or failure to act was negligent or not.

4. At the time of the accident and during all the times that the plaintiff was on board the steamship Everagra before and up to the time of the accident the steamship Everagre was not owned by nor in the possession of the defendants.

5. The plaintiff came on the vessel and was on the vessel at the time of the accident solely by

reason of the invitation of the United States of America, which owned and possessed the vessel. 991

6. These defendants did not invite the plaintiff to come on board the vessel nor to be there at the time of the accident or at any time prior thereto.

7. The plaintiff was not the business invitee of these defendants while he was on the steamship Everagra, and, therefore, these defendants did not owe to the plaintiff the duty of exercising reasonable care to have the premises, i.e., the boom, in safe condition so far as that duty would arise from the relationship of an occupier of premises and a business invitee. 992

8. The United States supplied to the plaintiff the boom and the other equipment which the plaintiff was using at the time of the accident for use by the plaintiff in the performance of his work.

9. The defendants did not supply the boom and the other equipment to the plaintiff for use by him in the performance of the work at the time of the accident, and the defendants therefore did not owe to the plaintiff the duty of exercising reasonable care to have the boom and other equipment in safe condition, so far as that duty would arise between the parties if the defendants had supplied the boom and equipment. 993

10. The defendants did not have any power or authority to prevent the plaintiff or any one else from coming on board the vessel previous to the accident; nor any power or authority to remove him or anyone else from the vessel at any time before the accident.

994 11. Pursuant to the requirement of the United States of America, the only agents of the United States who were caring for the interests of the United States in connection with the steamship Everagra, while the plaintiff was on board the vessel, were the berth agents Moore-McCormack Steamship Company who arranged for placing the vessel at the pier where it was and also arranged for the discharge of the cargo.

995 12. The duties which the defendants had agreed to perform for the account of the United States pursuant to the General Agency Agreement were owed solely to the United States of America and were not owed to the plaintiff.

13. The obligation to the United States of the defendants under the General Agency Agreement with respect to inspection of the vessel went no further under the evidence in this case than to receive information from the ship's officers as to those parts of the vessel which needed repair, to verify such information, and to transmit said information to the United States of America.

996 14. In performing the duties of inspecting the vessel in order to ascertain which part of it was in need of repair the officers and members of the crew were acting solely as agents and employees of the United States, and were not acting in any way for these defendants as agents of the United States.

15. These defendants as general agents had no obligation with respect to repairs of the vessel other than to arrange with some independent contractor

to make said repairs when they were under $10,000 and the only repairs with respect to which such an obligation arose were those which were disclosed to the agents by the ship's officers. 997

16. There is nothing in the General Agency Agreement or regulations which obligated the defendants to make an independent inspection of the vessel to discover any defects which may have been overlooked by the officers of the vessel and omitted from the requisitions for repairs prepared by the officers.

17. The privilege which the defendants had to go aboard the vessel for inspection so that they could later arrange for repairs has no bearing upon the question of control. The foregoing was charged by the court in Lafredo v. Bush Terminal Company, 261 N. Y. 323. See Record on Appeal, p. 189. 998

18. The privilege which the defendants had to go aboard the vessel for inspection so that they could later arrange for repairs is not in and of itself sufficient to establish control of the vessel by these defendants.

19. The defendants did not have any authority to instruct the officers and crew not to permit the stevedores, including the plaintiff, to use the boom which it is alleged caused the accident. 999

20. These defendants did not have any authority to instruct the longshoremen, including the plaintiff, not to use the boom which it is alleged caused the accident.

21. There is no evidence in the case that the
1000 defendants ever received any actual notice from the officers of the ship, or from any one else, before the accident happened that the boom was not in good and sound condition.

22. The fact that the general agent was required by the contract and, therefore, did go on board the vessel from time to time in the performance of services for the United States is not in and of itself sufficient to establish control of the vessel by these defendants.

1001 23. The fact that pursuant to the General Agency Contract these defendants were obligated to and did transmit orders from the United States to the Captain and members of the crew from time to time is not in and of itself sufficient to establish control of the vessel by these defendants.

24. The fact that these defendants were required by the General Agency Contract and, therefore, did give instructions to the Master, officers and crew of the steamship Everagra from time to time is not in and of itself sufficient to establish control of the
1002 vessel by these defendants.

25. The fact that the General Agency Contract required the defendants to perform for the United States all of the services mentioned therein and that the defendants performed those services is not in and of itself sufficient to establish control of the vessel by these defendants.

26. At the end of the voyage immediately preceding the happening of the accident on January

27th, 1944, the repairs required on the Everagra amounted to more than $10,000. Therefore, under the terms of the General Agency Agreement and the orders and regulations issued pursuant thereto the matter of arranging for all repairs on the vessel, while the vessel was in New York subsequent to said voyage and up to and including the time of the accident, was reserved by the United States to itself and these defendants did not have any duty to arrange for any repairs at said time. 1003

(The jury retired to deliberate on a verdict at 1:22 P.M.) 1004

(At 3:20 P.M.) The Court: I am sending up the general agency contract, Exhibit No. 1, and Exhibit 8, as requested.

(A paper was pasted over Article 8, Exhibit 1.)

(Sealed verdict ordered by the Court at five o'clock.)

Tuesday, June 12, 1945.

(Sidney Schiffman, Esq., appeared for Mr. Fisch on the verdict.) 1005

VERDICT

The Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: Yes, your Honor.

(Sealed verdict handed to the Court, and opened.)

Motion to Set Aside Verdict Denied.

The Clerk: Ladies and gentlemen of the jury,
1006 hearken to your verdict as it stands recorded. You say you find a verdict in favor of the plaintiff in the sum of $12,000. Verdict signed by all jurors. Is that unanimous, Mr. Foreman? It is a unanimous verdict?

The Foreman: Unanimous.

The Clerk: So say you all.

Mr. Parmer: I move to set aside the verdict on all the exceptions taken during the trial and on all the grounds set forth in Section 549 of the Civil Practice Act, except inadequacy.

1007 The Court: I am going to deny the motion to dismiss the complaint on which I reserved decision during the trial. I am going to deny your motion to set aside the verdict and give you 30 and 60 days, with appropriate exceptions.

Mr. Parmer: Thank you.

1008

Plaintiff's Exhibit 1.

GAA 4-4-42 Contract WSA—5558

SERVICE AGREEMENT FOR VESSELS OF WHICH THE WAR SHIPPING ADMINISTRATION IS OWNER OR OWNER PRO HAC VICE

THIS AGREEMENT, made as of March 1, 1943 between the UNITED STATES OF AMERICA (herein called the "United States") acting by and through the Administrator, War Shipping Administration, and Gerda Eckert and Thor Eckert, co-partners, doing business under the firm name and style of Thor Eckert and Company, with an office at 19 Rector Street, New York, New York (herein called the "General Agent").

WITNESSETH:

That in consideration of the reciprocal undertakings and promises of the parties herein expressed:

ARTICLE 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

ARTICLE 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to

and accepted by the General Agent for that pur-
1012 pose.

ARTICLE 3A. To the best of its ability, the General Agent shall for the account of the United States:

(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence
1013 of such orders, the General Agent shall follow reasonable commercial practices;

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agent;

(c) Equip, victual, supply and maintain the
1014 vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe;

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with re-

spect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder. 1015 1016

(e) Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. Unless the United States shall otherwise instruct, such Bills of Lading shall contain all exemptions and stipulations usual to the particular trade or service in which the vessels may be engaged, and reserve a lien upon all cargoes for the payment of freight, primage charges, dead freight, demurrage, forwarding charges, advance charges for carriage to port of shipment, for contributions in general average and special charges on cargo and for all fines or penalties which the vessels or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages or description of their contents. After a uniform Bill of Lading shall have been adopted by the United States, such Bill of Lading shall 1017

be used in all cases as soon as practicable after
1018 receipt thereof by the General Agent, with such modifications as shall be necessary for the particular trades in which the vessels hereunder shall from time to time be employed. Pending the issuance of such uniform Bill of Lading, the General Agent may continue to use its usual commercial form of Bill of Lading.

As soon as practicable after April 1, 1942, all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substan-
1019 tially that the General Agent makes no warranty or representation as to the authority of the United States or the Master to enter into the agreement, and that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof.

ARTICLE 3B. The General Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

(a) Perform the duties required to be per-
1020 formed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the United States in all respects and to avoid loss and damage of every nature to the United States;

(b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for freight are non-negotiable, and, where required, a freight contract or permit is issued for each shipment;

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including, without limitation of the foregoing, the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its agents. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States: 1021 1022

(d) Without the consent of the United States, not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, this Agreement or any interest therein, nor make any agreement or arrangement whereby the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof. 1023

ARTICLE 4. (a) The General Agent and, to the extent required by the United States, every related or affiliated company or holding company of the General Agent, authorized as provided in Article 13 hereof, to render any Service or to furnish any

stores, supplies, equipment, provisions, materials,
1024 or facilities which are for the account of the United States under the terms of this Agreement, shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which,
1025 in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

(c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provisions of this Article, the United States may rescind this Agreement.

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ARTICLE 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable

previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942. Such compensation shall be deemed to cover, but without limitation, the General Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than taxes for which the General Agent is reimbursed under Article 7 hereof), and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. 1027 1028

ARTICLE 6. The General Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreement shall be terminated by the General Agent whenever the United States shall so direct. Any compensation payable by the General Agent to its agents for services rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. In the event that any of the vessels covered by this Agreement are operated in a service in which an American citizen maintained a berth operation with American flag vessels on September 1, 1939, the General Agent, upon request of the United States, will assign such vessels to such berth operators as agents as may be appropriate under form of agreement prescribed by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States be reimbursable under Article 7 hereof. 1029

Plaintiff's Exhibit 1.

ARTICLE 7. The United States shall reimburse
1030 the General Agent at stated intervals determined, by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses here-
1031 under) and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The General Agent shall be reimbursed for sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder if the General Agent shall have used due diligence to secure immunity from such taxation. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection
1032 with the vessels hereunder, including, without limitation; all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss or personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board, any payments made by the General Agent to a pension

fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits under such plan, on the effective date of this Agreement, for the amount of any Social Security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise. The United States may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses which are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive. 1033 1034

Any moneys advanced to bonded persons by the General Agent for ship disbursements which are lost by reason of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the General Agent, subject to reimbursement as is in this ARTICLE 7 provided.

The United States may advance moneys to the General Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States may from time to time prescribe. 1035

ARTICLE 9. In the event of general average involving vessels assigned to the General Agent under this Agreement, the General Agent shall comply fully with all instructions issued by the United States in that connection including instructions as to the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements

accounts, documents and data required in the ad-
1036 justment, statement and settlement of the general average. Reasonable compensation for and general average allowances to the General Agent in such cases shall be in accordance with directions, orders or regulations of the United States.

ARTICLE 10. Salvage claims for services rendered to vessels other than vessels owned or controlled by the United States shall be handled by, and be under the control of, the United States. Salvage awards for services rendered to other ves-
1037 sels owned or controlled by the United States including the vessels hereunder shall be made by the United States. The General Agent shall furnish the United States with full reports and information on all salvage services rendered.

ARTICLE 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice.

(b) Upon giving to the United States thirty
1038 (30) days' written or telegraphic notice, the General Agent shall have the right to terminate this Agreement, but termination by the General Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

Plaintiff's Exhibit 1.

ARTICLE 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States, at times and places to be fixed by the United States, and the United States may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid: Provided, That the General Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Notwithstanding the foregoing provisions, when the United States shall so direct, the General Agent shall complete the business of voyages commenced prior to the date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instructions issued by the United States with respect thereto, the General Agent shall continue to book cargo for the vessels for the next voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation hereunder to indemnify the other party in respect of any claim or demand thereafter asserted, arising out of any matter done or omitted prior to the date of such termination.

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ARTICLE 13. Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, repairs, or facilities hereunder shall be submitted to the United States for ap-

proval as to employment. Unless and until such
1042 agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimbursement hereunder of any portion of such compensation which may be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in whole or in part, of compensation under any arrangement or agreement with an
1043 interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, or corporation in which the General Agent, or any related company of the General Agent, or any officer or director of the General Agent, or any employee of the General Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or employee, or any officer or director of any related company of the General Agent or any member of the immediate family of an officer or director of any related company of the General
1044 Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the General Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the General Agent. The term "control" (including the terms "controlled by" and "under common control with") as used herein means the possession, directly or indirectly,

of the power to direct or cause the direction of the management and policies of the General Agent (or related company), whether through ownership of voting securities, by contract, or otherwise. 1045

ARTICLE 14. The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable. 1046 1047

ARTICLE 15. The United States shall, when it may legally do so, have the advantage of any existing or future contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the General Agent.

Plaintiff's Exhibit 1.

ARTICLE 16. (a) The United States shall in-
1048 demnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims
1049 and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

(b) In view of the extraordinary wartime conditions under which vessels will be operated hereunder, the General Agent shall be under no responsibility or liability to the United States for loss or damage to the vessels arising out of any
1050 error of judgment or any negligence on the part of any of the General Agent's officers, agents, employees, or otherwise. However, the General Agent may be held liable for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by willful misconduct of principal supervisory shoreside personnel or by gross negligence of the General Agent in the procurement of licensed officers or in the selection of principal supervisory shoreside personnel.

(c) In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service for the vessels hereunder at commercial rates, the General Agent shall have all the obligations and responsibilities of the person performing such services under the standard or other approved form of contract with the United States or, in the absence of such standard or approved form, under usual commercial practice. 1051

(d) The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the General Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities. 1052

ARTICLE 17. Wherever and whenever herein any right, power, or authority is granted or given to the United States, such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its services hereunder, the General Agent may rely upon the instructions and directions of the Administrator, his officers and re- 1053

sponsible employees, or upon the instructions and
1054 directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given.

ARTICLE 18. (a) The General Agent warrants that it has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable
1055 hereunder the amount of such commission, percentage, brokerage or contingent fee.

(b) In any act performed under this Agreement, the General Agent and any subcontractor shall not discriminate against any citizen of the United States on the ground of race, creed, color or national origin.

ARTICLE 19. No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his
1056 use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The General Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

ARTICLE 20. Subject to the provisions of Article 5 hereof, this Agreement is in substitution of and hereby abrogates and replaces the so-called Bareboat Charter Agreements relating to the as-

signment or allocation to the General Agent of the vessels listed on Exhibit A hereto from the dates stated on such Exhibit. Preference Agreements relating to such allocated vessels shall be terminated and abrogated as of the same dates. 1057

All rights and obligations of the parties under said abrogated Bareboat Charter and Preference Agreements are hereby cancelled and this Agreement is made retroactive to the cancellation dates thereof as stated on Exhibit A hereto. However, the General Agent shall be reimbursed for any expenditure made before the earliest permissible cancellation date after March 22, 1942, under said agreements to the extent that such expenditure would have been considered in computing additional charter hire or freight under such agreements. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities. 1058

ARTICLE 21. This agreement supersedes and takes the place of Contract No. WSA 4440 which was executed in error by Thor Eckert and Company as a corporation, the corporation formerly known as Thor Eckert & Co. Inc. having been legally dissolved on October 15, 1941, and the undersigned officers of said corporation at the time of its dissolution do hereby consent to the cancellation and rescission of said Contract WSA 4440 as of the time of its execution. 1059

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in triplicate the day and year first above written.

Plaintiff's Exhibit 1.

UNITED STATES OF AMERICA

1060

By: E. S. LAND, ADMINISTRATOR
WAR SHIPPING ADMINISTRATION

By: PERCY CHUBB
TMT For the Administrator

THOR ECKERT AND COMPANY

By: GERDA ECKERT
Partner

1061 By: THOR ECKERT
Partner

THOR ECKERT & CO. INC. (Dissolved)

By: GERDA ECKERT
President

H. C. WINSCH
Secretary

WITNESS:

H. C. WINSCH

1062 H. C. WINSCH

(SEAL)

Approved as to form:

FRANK J. ZITO
Assistant General Counsel
War Shipping Administration

Plaintiff's Exhibit 1.

EXHIBIT "A" TO CONTRACT WSA

1063

Vessel	Date Allocation Approved	Date of Delivery	Cancellation Date of Previous Bare-Boat Charter or Preference Agreement, or both	Date of Redelivery
SS Kegums	3/1/43		Not Applicable	
SS Everâgra	5/27/43		"	

I, HAROLD C. WINSCH, certify that I am the duly chosen, qualified, and acting Secretary of Thor Eckert & Company, Inc. a party to this Agreement, 1064
and, as such, I am the custodian of its official records and the minute books of its governing body; that Gerda Eckert who signed this Agreement on behalf of said corporation, was then the duly qualified President of said corporation; that said officer affixed his manual signature to said Agreement in his official capacity as said officer for and on behalf of said corporation by authority and direction of its governing body duly made and taken; that said Agreement is within the scope of the corporate and lawful powers of this corporation.

1065

HAROLD C. WINSCH
Secretary

(SEAL)

Plaintiff's Exhibit 1.

ACKNOWLEDGMENT

1066

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

BE IT KNOWN, That on this 20th day of August, 1943, before me personally came Gerda Eckert and Thor Eckert to me known to be the person described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my
1067 hand and seal this 20th day of August, A. D. 1943.

(SEAL)

ROSE C. CINGOTTA
Notary Public, Bronx County
Bronx Co. Clk. No. 48, Reg. No. 24C5
Certificates Filed in
N. Y. Co. Clk. No. 145, Reg. No. 94C5
Commission Expires March 30, 1945

1068

Plaintiff's Exhibits 2, 3, 4 and 5.

Medical exhibits—omitted because not necessary for a determination of the appeal. 1069

Plaintiff's Exhibit 6.

Collection of orders and regulations of the War Shipping Administration—omitted pursuant to stipulation and order providing that originals or copies may be presented at the argument of the appeal.

1070

Plaintiff's Exhibit 7.

Book containing compilation of certain standard contract forms of War Shipping Administration—omitted pursuant to stipulation and order providing that original or copies may be presented at the argument of the appeal.

1071

Plaintiff's Exhibit 8.

WAR SHIPPING ADMINISTRATION

1072

New York, N. Y.

To: District and Local Managers, Maintenance and Repair Division; General Agents under Service Agreements with the War Shipping Administration; and Repair Contractors.

SUBJECT: MAINTENANCE AND REPAIR REGULATIONS No. 1 (REVISED)

Maintenance and Repair Order No. 1, dated
1073 May 13, 1942, is hereby cancelled and repairs to vessels owned by or under bareboat charter to and operated for the account of the United States represented by the War Shipping Administration are to be made in accordance with Maintenance and Repair Regulations No. 1 (Revised) and the Service Agreements under which the vessels may be operated.

R. T. LEMON
Executive Manager
Maintenance and Repair Division

1074 August 20, 1942.

WAR SHIPPING ADMINISTRATION

New York, N. Y.

MAINTENANCE AND REPAIR REGULATIONS
NO. 1 (REVISED)

Plaintiff's Exhibit 8.

To: District and Local Managers, Maintenance and Repair Division; General Agents under Service Agreements with the War Shipping Administration; and Repair Contractors. 1075

SUBJECT: Maintenance and repair of vessels, owned by, or under bareboat charter to, and operated for account of the United States, represented by the War Shipping Administration.

1. Organization and Functions of Maintenance and Repair Division 1076

The War Shipping Administration has established, under the supervision of the Assistant Deputy Administrator for Ship Operations, a Maintenance and Repair Division, the Executive Office of which, is located in New York City. Branch offices have been established in the principal repair ports of the United States.

The maintenance and repair of all vessels owned by, or under bareboat charter to, and operated for account of the United States, represented by the War Shipping Administration, are under the direction of the Executive Manager, Maintenance and Repair Division, who will exercise full authority and control over all ship repairs and maintenance in which the War Shipping Administration may be concerned, all subject to the control of the Administrator and the Assistant Deputy Administrator for Ship Operations and outstanding delegations of authority, and, in collaboration with the Army, Navy and other Government Departments, will supervise conversions and the arming and degaussing of merchant vessels. 1077

Plaintiff's Exhibit 8.

Each District (as defined in Administrative Orders No. 14 and supplements thereto) will have a District Manager who shall be responsible to the Executive Manager for all ship repairs and maintenance in that District. The Atlantic Coast District Headquarters are located at 45 Broadway, New York, N. Y.; the Gulf Coast District Headquarters are located at the Federal Office Building, New Orleans, Louisiana; and the Pacific Coast District Headquarters are located at 200 Bush Street, San Francisco, California.

There are located at the principal repair ports in the United States, Local Managers or Principal Surveyors, who will cooperate with General Agents in arranging for surveys and inspections and will supervise repair operations in such ports.

2. Repairs to be Ordered by General Agents

In instances where vessels owned by, or under bareboat charter to, the United States and assigned to General Agents under Service Agreements with the War Shipping Administration, require repairs (other than structural changes, arming, degaussing, defensing and installation of convoy operating measures) involving the expenditure of not more than $10,000.00 in respect to any one voyage, the General Agents shall arrange for and order the performance of such repairs without prior written approval of the Local Manager, Maintenance and Repair Division. However, General Agents shall promptly notify, and obtain written approval from, the Local Manager, Maintenance and Repair Division whenever it becomes apparent that actual expenditures will exceed the prescribed limitation of $10,000.00.

Plaintiff's Exhibit 8.

Subject to the foregoing, General Agents shall: 1081

(a) Determine the repairs necessary;

(b) Arrange with the Coordinator for Ship Repairs and Conversion for designation of the shipyards which are to perform the work;

(c) Arrange with the Local Manager for drydocking and other surveys, and for inspectors to view the work when the cost of repairs may exceed the prescribed limit;

(d) Prepare and submit specifications in sufficient detail to describe fully the work to be performed, forwarding a copy to the Local Manager. Specifications must show the classification of the work, such as hull, engine, Steward's Department, insurance and improvements. 1082

(e) Place in hand and award contracts for repairs.

(f) Supervise to completion, irrespective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Society and Bureau of Marine Inspection and Navigation, and approved changes and improvements; 1083

(g) Obtain completion certificates, signed by a representative of the General Agent, the Master or Chief Officer, and Chief Engineer, showing that the repairs have been completed.

Plaintiff's Exhibit 8.

General Agents are to award the repairs subject
1084 to the terms of the current basic (master) contract in effect between the contractor and the War Shipping Administration, or, in the absence of a holder of a basic contract for such repairs as required, the General Agent shall award the repairs on a cost plus fixed fee basis, provided the fixed fee does not exceed seven per cent of the cost, based on an estimate made by the general agent before work commences, and the form of contract conforms, as far as practicable, to standard forms of contract approved by the Administrator.

1085 General Agents shall make no structural changes in the vessel, and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance, first, securing the written approval of the Local Manager, Maintenance and Repair Division.

The Payments for all repairs awarded by the General Agents in accordance with this order are to be made by them directly to the repair contractors and charges therefor should be included in the voyage accounts prescribed in Fiscal Regulations No. 1.

1086 3. Repairs to be Ordered by the Maintenance and Repair Division

Specifications are to be prepared, and contracts awarded, by the Maintenance and Repair Division, in accordance with basic (Master) contracts, or subject to the terms of a basic contract to be executed by the contractor by whom the repairs are to be made, in all instances involving the following categories:

Plaintiff's Exhibit 8.

(a) Repairs to vessels owned by, or under bareboat charter to, the United States and assigned to General Agents under Service Agreements with the War Shipping Administration, involving the expenditure of more than $10,000.00 in respect to any one voyage, except in an instance where the General Agents arrange for and order the performance of such repairs on the basis of estimates indicating that their cost will not exceed $10,000.00 and it later develops that the actual expenditures exceed that limitation. 1087

(b) Special service requirements, arming, degaussing, and installation of defense features, 1088

(c) Repairs to vessels owned by, or under bareboat charter to, the United States but not assigned to a General Agent under a Service Agreement, and

(d) Repairs to vessels under time charter to the United States when such repairs are determined to have resulted from a risk assumed by the War Shipping Administration under such time charter.

1089

The payments for all repairs awarded by the Division of Maintenance and Repair, in accordance with this order, are to be made by the War Shipping Administration directly to the repair contractor upon receipt of properly executed public vouchers.

R. T. LEMON
Executive Manager
Maintenance and Repair Division

AUGUST 20, 1942.

Defendant's Exhibits A, B, C and D.

1090 Photographs—omitted pursuant to stipulation and order providing that originals or copies may be presented at the argument of the appeal.

Defendant's Exhibit E.

Model of ship—omitted pursuant to stipulation and order providing that original may be presented at the argument of the appeal.

1091

Defendant's Exhibit F.

Photograph—omitted pursuant to stipulation and order providing that original or copy may be presented at the argument of the appeal.

Defendant's Exhibits G, H, I and J.

1092 Medical exhibits—omitted because not necessary for the determination of the appeal.

Defendant's Exhibits K-1, K-2 and K-3.

Pieces of wood—omitted pursuant to stipulation and order providing that originals may be presented at the argument of the appeal.

Defendant's Exhibit L.

Certificate—omitted pursuant to stipulation and order providing that original or copy may be presented at the argument of the appeal. 1093

Defendant's Exhibit M.

Maintenance and Repair Regulation (revision of Dec. 15, 1944, effective Jan. 15, 1945)—omitted because withdrawn at trial.

1094

Defendant's Exhibits N, O, P and Q.

Photographs—omitted pursuant to stipulation and order providing that originals or copies may be presented at the argument of the appeal.

Defendant's Exhibits R and S.

Envelopes and pieces of wood enclosed—omitted pursuant to stipulation and order providing that originals may be presented at the argument of the appeal. 1095

Defendant's Exhibit T.

Stevedoring contract between War Shipping Administration and the Jarka Corporation—omitted pursuant to stipulation and order providing that original or copy may be presented at the argument of the appeal.

Defendant's Exhibit U.

1096 Letter—omitted pursuant to stipulation and order providing that original or copy may be presented at the argument of the appeal.

Defendant's Exhibits V-1 and V-2.

Pieces of wood—omitted pursuant to stipulation and order providing that originals may be presented at the argument of the appeal.

1097

Statement That the Case Contains All the Evidence.

The foregoing case contains all the evidence taken and proceedings had on the trial of the above-entitled action together with the objections and exceptions of both parties, which are material on this appeal, with the exception of exhibits not necessary for a determination of this appeal and certain other exhibits, which, pursuant to stipulation and order, will be presented at the argument of the appeal.

1098

Stipulation as to Exhibits.

SUPREME COURT
OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

PETER CALDAROLA,

Plaintiff-Respondent,

—against—

GERDA ECKERT and THOR ECKERT, JR., partners, doing business under the firm name of THOR ECKERT & COMPANY,

Defendants-Appellants.

IT IS HEREBY STIPULATED that the originals or copies of the following exhibits may be presented to the Court on the argument of this appeal:

Plaintiff's Exhibit 6: Collection of orders and regulations of the War Shipping Administration, together with any other written orders and regulations which, pursuant to the stipulation at the trial, may be considered as in evidence in this case.

Plaintiff's Exhibit 7: Book containing compilation of certain standard contract forms.

Defendant's Exhibits A, B, C, D, F, N, O, P and Q: Photographs.

Defendant's Exhibit L: Certificate.

Defendant's Exhibit T: Stevedoring contract between the War Shipping Administration and The Jarka Corporation.

Defendant's Exhibit U: Letter.

Stipulation as to Exhibits.

1102 AND IT IS FURTHER STIPULATED that the originals of the following may be presented to the Court on the argument of this appeal:

Defendant's Exhibits K1, K2 and K3: Pieces of wood.

Defendant's Exhibits R and S: Envelopes and pieces of wood enclosed.

Defendant's Exhibit E: Ship model.

Defendant's Exhibits V1 and V2: Pieces of wood.

1103 AND IT IS FURTHER STIPULATED that copies of the foregoing exhibits need not be printed nor reproduced in any manner in the case on appeal herein.

Dated, New York, October 17, 1945.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Appellants.

A. M. FISCH,
Attorney for Plaintiff-Respondent.

So Ordered
F.M.

1104

Affidavit of No Opinion.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*: 1105

RAYMOND PARMER, being duly sworn, deposes and says:

I am a member of the firm of Kirlin, Campbell, Hickox & Keating, attorneys for the defendants-appellants in this action and I am familiar with all the proceedings had herein.

In deciding the foregoing case, Honorable James B. M. McNally, Trial Justice, rendered no opinion in writing. 1106

RAYMOND PARMER.

Sworn to before me this
6th day of December, 1945.

EDMUND E. KELLY, Notary Public
N. Y. Co. Clk's No. 254, Reg. No. 440-K-6
Kings Co. Clk's No. 184, Reg. No. 332-K-6
Commission expires March 30, 1946.

1107

Stipulation Settling Case.

IT IS HEREBY STIPULATED that the foregoing case
1108 contains all the evidence given upon the trial of this action together with all the objections and exceptions of both sides taken upon the trial, material on this appeal, with the exception of plaintiff's Exhibits 2, 3, 4 and 5, and defendant's Exhibits G, H, I and J, which are not necessary for a determination of this appeal, defendant's Exhibit M which was withdrawn at the trial and with the further exception of plaintiff's Exhibits 1, 6, 7 and 8, and defendant's Exhibits A, B, C, D, E, F, K-1, K-2, K-3, L, N, O, P, Q, R, S, T, U, V-1 and V-2, which
1109 may be presented at the argument of the appeal pursuant to stipulation and order, and that the foregoing case be settled and ordered filed and annexed to the judgment roll.

Dated, New York, N. Y., December 6, 1945.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Appellants.

ABRAHAM M. FISCH,
Attorney for Plaintiff-Respondent.

1110

Order Settling Case.

On the foregoing stipulation that the above case on appeal contains all the evidence and objections and exceptions of all the parties, material on this appeal, with the exception of certain exhibits as set forth in said stipulation, it is hereby settled and ordered filed.

Dated: New York, N. Y. December 7, 1945.

JAMES B. M. McNALLY,
J. S. C.

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, case and exceptions, judgment appealed from and all the papers used before the Court below and the whole thereof, now on file in the office of the Clerk of The Supreme Court of the State of New York, County of New York. 1111

Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, December 6, 1945. 1112

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Appellants.

ABRAHAM M. FISCH,
Attorney for Plaintiff-Respondent.

Order Filing Record in Appellate Division.

Pursuant to the foregoing stipulation it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department. 1113

Dated, New York, December 7, 1945.

JAMES B. M. MCNALLY,
J. S. C.

Court of Appeals

OF THE STATE OF NEW YORK

PETER CALDAROLA,

Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, Inc.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, Jr., partners doing business under the firm name of THOR ECKERT & CO.,

Defendants-Respondents.

SUPPLEMENTAL ADDITIONAL PAPERS TO THE COURT OF APPEALS

ABRAHAM M. FISCH,
Attorney for Plaintiff-Appellant,
No. 225 Broadway,
Borough of Manhattan,
City of New York.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Respondents,
No. 120 Broadway,
Borough of Manhattan,
City of New York.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 43 NEW CHAMBERS ST., N. Y.

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Notice of Appeal from Resettled Order

Court of Appeals

OF THE STATE OF NEW YORK

PETER CALDAROLA,
Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Defendants-Respondents.

Sirs:

PLEASE TAKE NOTICE that the plaintiff Peter Caldarola hereby appeals to the Court of Appeals of the State of New York from a resettled order dated April 5, 1946 and entered in the office of the Clerk of the Supreme Court of the State of New York, Appellate Division, First Department on the 25th day of June, 1946 where by the terms of the said order the Appellate Division ordered and adjudged that the

judgment in favor of the plaintiff and against the defendants above named be in all things reversed upon questions of law and the facts with costs to the defendants and plaintiff's complaint dismissed with costs. Plaintiff Peter Caldarola, also appeals from the judgment entered in the office of the Clerk of the County of New York on the 9th day of April, 1946 which was in favor of the defendants Gerda Eckert and Thor Eckert, Jr., and against the plaintiff in the sum of $866.95. Plaintiff appeals from each and every part of the said order and each and every part of the judgment as well as from the whole thereof.

Dated: New York, June 28, 1946.

Yours, etc.,

ABRAHAM M. FISCH,
Attorney for Plaintiff,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
City of New York.

To:

KIRLIN, CAMPBELL, HICKOX & KEATING, ESQS.,
Attorneys for Defendants-Respondents,
120 Broadway,
New York City.

COUNTY CLERK OF THE COUNTY OF NEW YORK.

Order on Motion for Resettlement, Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of June, 1946.

Present:

Hon. Francis Martin,
Presiding Justice.
" Alfred H. Townley,
" Edward J. Glennon,
" Joseph M. Callahan,
" David W. Peck,
Justices.

16337

Peter Caldarola,
Respt.,

—against—

Moore-McCormack Lines, Inc.,
Deft.,

impleaded with

Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co.,
Defts.-Applts.

The above named respondent having moved

10 *Order on Motion for Resettlement, Appealed From*

for a resettlement of the order made herein and entered and filed in the office of the Clerk of this Court on the 5th day of April, 1946,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Abraham M. Fisch, in support of said motion, and the affidavit of Raymond Parmer, in opposition thereto, and after hear-
11 ing Mr. Abraham M. Fisch for the motion, and Mr. Raymond Parmer opposed,

It is ordered that said order be and the same hereby is resettled to read as follows:

12

5

Order on Motion for Resettlement, Appealed From 13

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of April, 1946.

Present:

HON. FRANCIS MARTIN,
Presiding Justice.

" ALFRED H. TOWNLEY, 14

" EDWARD J. GLENNON,

" JOSEPH M. CALLAHAN,

" DAVID W. PECK,
Justices.

16337

PETER CALDAROLA,
Respt.,

—against— 15

MOORE-McCORMACK LINES, INC.,
Deft.,

impleaded with

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Defts.-Appdts.

An appeal having been taken to this Court

16 *Order on Motion for Resettlement.*
Appealed From

by the defendants Gerda Eckert and Thor Eckert, Jr., partners, etc., from the judgment of the Supreme Court, New York County, entered on the 13th day of June, 1945, and said appeal having been argued by Mr. Raymond Parmer, of counsel for the appellants, and by Mr. Abraham M. Fisch, of counsel for the respondent; and due deliberation having been had thereon,

17

IT IS HEREBY ORDERED AND ADJUDGED that the judgment so appealed from be and the same is hereby, in all things, reversed upon questions of fact and of law, with costs to the appellants, and the complaint dismissed with costs. (Two of the Justices dissent and vote to affirm.)

D. W. P.

18

Waiver of Certification

(Court of Appeals)

Pursuant to Section 170 of the Civil Practice Act,

It is hereby stipulated that the foregoing consists of true and correct copies of the Notice of Appeal, dated June 28, 1946, the resettled order reversing the judgment in favor of the plaintiff and dismissing the complaint of the plaintiff dated April 5, 1946, all of which are now on file in the office of the Clerk of the County of New York.

Certification of all the foregoing papers is hereby waived.

Dated: New York, N. Y., July 5, 1946.

Abraham M. Fisch,
Attorney for Plaintiff-Appellant.

Kirlin, Campbell, Hickox & Keating,
Attorneys for Defendants-Respondents.

[fol. 406] STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, Leland F. Coss, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Peter Caldarola, Appellant, v. Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert et al., Partners under the Firm Name of Thor Eckert & Co., Respondents, decided by the Court of Appeals on the 23rd day of July, 1946, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as a Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 7th day of September, 1946.

Leland F. Coss, as Reporter of the Court of Appeals of the State of New York. (Seal.)

Attest: (L. S.) John Ludden, Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, John T. Loughran, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that John Ludden is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Leland F. Coss is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Peter Caldarola, Appellant, v. Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert et al., Partners under the Firm Name of Thor Eckert & Co., Respondents, decided by the said Court of Appeals on the 23rd day of July, 1946, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Ap-

peals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of John Ludden, as clerk of said court, appended thereto is the true and genuine signature of said John Ludden, and the signature of Leland F. Coss, as reporter of said court, appended thereto is the true and genuine signature of said Leland F. Coss.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York on the 10th day of September in the year one thousand nine hundred and forty-six.

John T. Loughran, as Chief Judge of the Court of Appeals of the State of New York.

[fol. 407] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of June, 1946.

Present: Hon. Francis Martin, Presiding Justice, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Joseph M. Callahan, Hon. David W. Peck, Justices.

16337

PETER CALDAROLA, Respt.,

vs.

MOORE-McCORMACK LINES, INC., Deft.,

Impleaded with GERDA ECKERT and THOR ECKERT, JR., Partners Doing Business Under the Firm Name of Thor Eckert & Co., Deft.-Applts.

ORDER ON MOTION FOR RESETTLEMENT

The above named respondents having moved for a resettlement of the order made herein and entered and filed in the office of the Clerk of this Court on the 5th day of April, 1946,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Abraham M. Fisch, in support of said motion, and the affidavit of

Raymond Parmer, in opposition thereto, and after hearing Mr. Abraham M. Fisch for the motion, and Mr. Raymond Parmer opposed,

It is ordered that said order be and the same hereby is resettled to read as follows:

[fol. 408] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of April, 1946.

Present: Hon. Francis Martin, Presiding Justice, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Joseph M. Callahan, Hon. David W. Peck, Justices.

16337

PETER CALDAROLA, Respt.,

vs.

MOORE-McCORMACK LINES, INC., Deft.,

Impleaded with GERDA ECKERT and THOR ECKERT, JR., Partners Doing Business Under the Firm Name of Thor Eckert & Co., Defts.-Applts.

An appeal having been taken to this court by the defendants Gerda Eckert and Thor Eckert, Jr., partners, etc., from the judgment of the Supreme Court, New York County, entered on the 13th day of June, 1945, and said appeal having been argued by Mr. Raymond Parmer of counsel for the appellants, and by Mr. Abraham M. Fisch, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, reversed upon questions of fact and of law, with costs to the appellants, and the complaint dismissed with costs. (Two of the Justices dissent and vote to affirm.)

D. W. P.

[fol. 409] APPELLATE DIVISION OF THE SUPREME COURT,
First Judicial Department,
Clerk's Office, County of New York:

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order as

resettled made by said Court upon the appeal in the above entitled action or proceeding, and entered in my office on the 25th day of June, 1946.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 26th day of June, 1946.

George T. Campbell, Clerk. (Seal.)

[fol. 410] [Endorsed:] Supreme Court, Appellate Division, First Department. Peter Caldarola, Respondent, against Moore-McCormack Lines, Inc., et al., Appellants. Order of Resettlement. Abraham M. Fisch, Attorney for respondent, 225 Broadway, Borough of Manhattan, New York City.

[fol. 411] UNREVISED AND UNCORRECTED

NOT FOR PUBLICATION

43—N.Y. Opinion—Vol. 295—7497

PETER CALDAROLA, Appellant,

v.

MOORE-MCCORMACK LINES, INC., Defendant and GERDA ECKERT et al., partners under the firm Name of THOR ECKERT & Co,. Respondents

Decided July 23, 1946

Abraham M. Fisch and Sidney Schiffman for appellant.

Raymond Parmer and Vernon Sims Jones for respondents.

DESMOND, J. Plaintiff, a longshoreman, was injured while working on the deck of a steamship moored at a New York City pier, by reason of the breaking of a cargo boom which was part of the ship's gear and which, the jury held, was defective. Plaintiff was not a member of the ship's crew but was an employee of an outside stevedoring contractor. The vessel was owned by the United States. Plaintiff sued defendants-respondents Eckert, alleging and attempting to prove that those defendants were so much in possession and control of the ship, at the time of the

accident, as to make them responsible to third persons lawfully on board, for injuries caused by unsafe conditions on the ship. The jury found for plaintiff but the Appellate Division reversed upon the facts and law, and dismissed the complaint.

Defendants were not charterers of the vessel nor did they physically operate it. Plaintiff's contention that defendants had a duty to him, to keep the ship in repair, was based on the terms of a "General Agency Contract" made between defendants and the United States and covering this and other ships, plaintiff relying also on certain governmental "Regulations" which supplemented and amplified that contract. By the contract and the regulations defendants were appointed "agents" to manage and conduct the business of "those ships. The Appellate Division held that nothing in the arrangements between defendants and the United States made defendants any more than managers of certain aspects of the ship's "business" and that defendants were not operators of the ship or responsible to third persons for its condition. Accordingly, held the Appellate Division, (270 App. Div. 563, 566) any failure by defendants to perform such duties as were assigned to them by the United States in connection with repairs to the ship, was "strictly non-feasance" for which defendants were answerable to their principal, the United States, but not to plaintiff. The Appellate Division cited

and applied Cullinos V. Goetz (256 N.Y. 287) where Chief Judge Cardozo wrote (p. 290): "Liability in tort is an incident to occupation or control."

We are in full agreement with the Appellate Division's conclusions and the reasons therefor as stated in its opinion. [fol. 412] There would be no occasion for writing this opinion were it not for plaintiff's reliance on the decision of the United States Supreme Court (handed down the day before the argument of the present case in our court) in Hust V. Moore-McCormack Lines, Inc. — U.S.* —). In that case the Supreme Court reversed a decision of the Supreme Court of Oregon which had dismissed the suit of plaintiff Hust, who, unlike the present plaintiff, was a

*66 S. Ct. 1218; 90 L. Ed. 1220; F. 90 L. Ed. 663, 666.

seaman. The "General Agency contract" made between the United States and defendant in the Hust case was identical with the contract of the present defendants with the government. But Hust's suit was brought under the "Jones Act" (— U. S. Code, tit. 46, Sec. 688) which gives a seaman a statutory cause of action in negligence against his employer. The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the "General Agent". A concurring opinion by two of the Supreme Court Justices, in the Hust case, goes much further and construes the "General Agency contract" as putting the agent in possession and control of the ship. Since that minority holding is not the holding of the court, we are not bound to follow it nor to decide whether, if it were the decision of the court, we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party (See S.R.A. v. Minnesota, U.S.F.). We find nothing in this record to prove possession or control of the ship in these defendants Eckert, and so hold with the Appellate Division that whatever his other remedy might be against the United States or anyone else (see the Federal "Suits in Admiralty Act", U.S. Code, tit. 46 Sec. 742), plaintiff has no cause of action against these defendants. We agree with the Appellate Division that Brady v. Roosevelt S. S. C. (317 U.S. 575) is not authority for plaintiff's position here, since in the Brady case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it.

The judgment should be affirmed, with costs.

Lougnran, Ch., J., Lewis, Conway, Thacher and Fuld, JJ., concur: Dye, J., taking no part.

Judgment affirmed.

[fol. 413] [Endorsed:] State of New York, Court of Appeals. Peter Caldarola, Appellant, Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert, et al., Respondents. Opinion. Abraham M. Fisch, Attorney for Appellant, 225 Broadway, Borough of Manhattan, New York City.

[fol. 414] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 23rd day of July—in the year of our Lord one thousand, nine hundred and forty-six, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding.

John Ludden, Clerk.

REMITTITUR—July 23, 1946

PETER CALDAROLA, Appellant,

against

MOORE-McCORMACK LINES, INC., Defendant,

and

GERDA-ECKERT, & ANO., Partners, &c., Respondents

Be it remembered, that on the 26th day of April, in the year of our Lord, one thousand nine hundred and forty-six Peter Caldarola, the appellant in this cause, came here unto the Court of Appeals, by Abraham M. Fisch, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, which return was thereafter amended.

And Gerda Eckert, & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Kirlin, Campbell, Hickox & Keating, their attorneys.

[fol. 415] Which said Notice of Appeal and the amended return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Abraham M. Fisch of counsel for the appellant and by Mr. Raymond Parmer, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs. . . .

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the

said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and amended return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the justices thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 23, 1946.

I hereby certify, that the preceding record contains a correct transcript of the proceeding in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 416] [Endorsed:] Court of Appeals, State of New York. Peter Caldarola, Appellant, against Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert, & ano., Respondents. Remittitur. Abraham M. Fisch, Attorney for Appellant, 225 Broadway, Borough of Manhattan, New York City.

[fol. 417] At a Special Term, Part II of the Supreme Court held in and for the County of New York at the Court House thereof, New York, N. Y., on the 1st day of August 1946.

Present: Honorable Joseph A. Gavagan, Justice.

PETER CALDAROLA, Plaintiff

against

MOORE-MCCORMACK LINES, INC., and GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., Defendants.

ORDER ON REMITTITUR OF COURT OF APPEALS, 8618/1944

The plaintiff having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court for the First Judicial Department entered in the office of the Clerk of the County of New York, on the 9th day of April 1946 which reversed the judgment for the plaintiff in the total sum of $12,191.10 entered in the office of said Clerk on June 13, 1945 and dismissed the complaint with costs in the sum of $866.95, and the Court of Appeals having, on July 23, 1946, affirmed the said judgment, with costs,

Now on reading and filing the remittitur with Court of Appeals dated July 23, 1946, and on motion of Kirlin, Campbell, Hickox & Keating, Attorneys for Defendants Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., it is

[fol. 418] Ordered that the judgment of the Court of Appeals be and is hereby made the judgment of this Court, and the Clerk of the County of New York is directed to enter judgment affirming the said judgment of the Appellate Division of the Supreme Court for the First Judicial Department, with costs on appeal.

Enter

J. A. G., J. S. C.

[fol. 419] SIRS:

Please take notice that a order, of which the within is a copy, was filed and entered in the office of the clerk of the above named Court, on August 1, 1946.

Yours, &c., Kirlin, Campbell, Kickox & Keating.

[Endorsed:] Supreme Court, County of New York. Peter Caldarola, Plaintiff, against Moore-McCormack Lines, Inc., and Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., defendants. Order on Remittitur of Court of Appeals. Kirlin, Campbell, Hickox & Keating, Attorneys for Defendants, One Twenty Broadway, New York 5, N. Y. Filed 8/1/46. N. Y. Co. Clks. Office, Aug. 7, 1946. Abraham M. Fisch, Attorney for Plaintiff.

[fol. 420] SUPREME COURT, NEW YORK COUNTY

PETER CALDAROLA, Plaintiff,

against

MOORE-MCCORMACK LINES, INC., and GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., Defendants.

JUDGMENT OF AFFIRMANCE BY COURT OF APPEALS, 8618/1944

The plaintiff having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court for the First Judicial Department entered in the office of the Clerk of the County of New York, on the 9th day of April 1946, which reversed the judgment for the plaintiff in the total sum of $12,191.10, entered in the office of said Clerk on June 13, 1945, and dismissed the complaint with costs in the sum of $866.95, and the Court of Appeals having, on July 23, 1946, affirmed the said judgment with costs, and the remittitur of the Court of Appeals having been filed in the office of the Clerk of the County of New York, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court and directing the entry of a judgment of affirmance herein with costs,

Now on motion of Kirlin, Campbell, Hickox & Keating, Attorneys for Defendants, Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., it is

Adjudged that the judgment of the Appellate Division of the Supreme Court for the First Judicial Department entered in the office of the Clerk of the County of New York on June 13, 1945, which reversed the judgment for the [fol. 421] plaintiff in the total sum of $12,191.10 entered herein on June 13, 1945, and dismissed the complaint with costs in favor of Defendants, Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., in the sum of $866.95, be and is hereby affirmed, and that the said Defendants, Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., of 19 Rector Street, Borough of Manhattan, City of New York, recover of Peter Caldarola, plaintiff, of 1050 67th Street, Borough of Brooklyn, City of New York, the sum of $191.35, costs on appeal as taxed, and that said defendants have execution thereon.

Judgment signed this 7th day of August, 1946. Archibald R. Watson, Clerk.

[fol. 422] [Endorsed:] Supreme Court, New York County. Peter Caldarola, Plaintiff, against Moore-McCormack Lines, Inc., and Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., Defendants. Judgment of Affirmance by Kirlin, Campbell, Hickox & Keating, Attorneys for Gerda Eckert and Thor Eckert, Jr., etc., One Twenty Broadway, New York 5, N. Y. Filed 8/1/46, N. Y. Co. Clks. office. Received Aug. 7, 1946. Abraham M. Fisch, Attorney for Plaintiff.

[fol. 423] SUPREME COURT, NEW YORK COUNTY

PETER CALDAROLA, Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC., Defendant, and GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., Defendant-Respondents.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have compared the foregoing record on appeal to the Court of Appeals, entered and filed in my office on August 1, 1946, remittitur of the Court of Appeals dated July 23, 1946 both entered and filed in my office on August 1, 1946 and the opinion of the Court of Appeals filed Sept. 13, 1946 the order of Supreme Court dated August 1, 1946 and entered and filed in my office on August 1, 1946, making the order and judgment of the Court of Appeals the order and judgment of the Supreme Court and the judgment entered on remittitur of the Court of Appeals filed and entered on August 7, 1946 and that each of the foregoing is a true and correct transcript therefrom and the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my official seal this 16th day of September, 1946.

Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County. (Seal.)

[fol. 424] [Endorsed:] Supreme Court, New York County. Peter Caldarola, Plaintiff-Appellant, against Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert, et al., Defendant-Respondents. Certification of Record. Abraham M. Fisch, Attorney for plaintiff-appellant, 225 Broadway, Borough of Manhattan, New York City.

[fol. 425] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 625

ORDER ALLOWING CERTIORARI—Filed November 12, 1946

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.